TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 107

ELIZABETH DONNER HANSON, INDIVIDUALLY, AS EXECUTRIX OF THE WILL OF DORA BROWNING DONNER, DECEASED, ET AL., APPELLANTS,

vs.

KATHERINE N. R. DENCKLA; INDIVIDUALLY, AND ELWYN L. MIDDLETON, AS GUARDIAN OF THE PROPERTY OF DOROTHY BROWNING STEWART, ETC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

FILED APRIL 17, 1957.

JURISDICTION POSTPONED JUNE 17, 1957

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APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., OCTOBER 29, 1957

[fol. A] **IN THE SUPREME COURT OF THE STATE OF FLORIDA**

ELIZABETH DONNER HANSON, individually, as Executrix of the Will of DORA BROWNING DONNER, Deceased, and as Guardian ad litem for JOSEPH DONNER WINSOR and DONNER HANSON, and WILLIAM DONNER ROOSEVELT, individually, Appellants,

v.

KATHERINE N. R. DENCKLA, individually, and ELWYN L. MIDDLETON, as Guardian of the property of DOROTHY BROWNING STEWART, also known as Dorothy B. Stewart and Dorothy B. Rodgers Stewart, an incompetent person, Appellees.

AN APPEAL FROM THE CIRCUIT COURT OF PALM BEACH COUNTY, FLORIDA

TRANSCRIPT OF RECORD—Filed May 2, 1955

Messrs. Caldwell, Pacetti, Robinson & Foster, Attorneys at Law, 501 Harvey Building, West Palm Beach, Florida, Attorneys for Appellants.

Mr. William H. Foulk, Attorney at Law, Delaware Trust Building, Wilmington, Delaware, Of Counsel for Appellants.

Messrs. McCarthy, Lane & Adams, Attorneys at Law, Atlantic National Bank Building, Jacksonville, Florida, Attorneys for Appellants.

Mr. C. Robert Burns, Attorney at Law, 1318 Harvey Building, West Palm Beach, Florida, Attorney for Appellees.

Messrs. Redfearn & Ferrell, Attorneys at Law, 550 Brickell Avenue, Miami, Florida, Attorneys for Appellees.

[fol. 1] IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

IN CHANCERY No. 31,980

KATHERINE N. R. DENCKLA, individually, and ELWYN L. MIDDLETON, as guardian of the property of DOROTHY BROWNING STEWART, also known as Dorothy B. Stewart and Dorothy B. Rodgers Stewart, an incompetent person, Plaintiffs,

v.

WILMINGTON TRUST COMPANY, a Delaware corporation; LOUISVILLE TRUST COMPANY, a Kentucky corporation; DELAWARE TRUST COMPANY, a Delaware corporation; BRYN-MAWR HOSPITAL, a Pennsylvania corporation; THE DONNER CORPORATION, a Pennsylvania corporation; BENEDICT H. HANSON; JOHN STEWART; DORA BROWNING STEWART LEWIS; MARY WASHINGTON STEWART BORIE; MIRIAM V. MOYER; JAMES SMITH; DORA DONNER IDE; PAULA BROWNING DENCKLA; WILLIAM DONNER DENCKLA; WILLIAM DONNER ROOSEVELT; DONNER HANSON; JOSEPH DONNER WINSOR; WALTER HAMILTON; ELIZABETH DONNER HANSON, individually, and as executrix of the will of DORA BROWNING DONNER, deceased, Defendants.

[fol. 2] BILL FOR DECLARATORY DECREE—
Filed January 22, 1954

To the Above Styled Court, and to the Honorable Judges Thereof:

The above named plaintiffs bring this bill for declaratory decree against the above named defendants, and respectfully allege:

1.

The defendant, Wilmington Trust Company, is a Delaware corporation with its principal office and place of business in Wilmington, Delaware.

The defendant, Louisville Trust Company, is a Kentucky corporation with its principal office and place of business in Louisville, Kentucky.

The defendant, Delaware Trust Company, is a Delaware corporation with its principal office and place of business in Wilmington, Delaware.

The defendant, Bryn-Mawr Hospital, is a Pennsylvania corporation with its principal office and place of business in Bryn Mawr, Pennsylvania.

The defendant, The Donner Corporation, is a Pennsylvania corporation with its principal office and place of business at 1710 Fidelity Trust Building, Philadelphia, Pennsylvania.

Diligent search and inquiry have been made to discover the true names, domiciles, principal places of business, and status of said foreign corporations, and the same are set forth above in this bill for declaratory decree as particularly as are known to the plaintiffs and to the affiant making the affidavit by which this bill for declaratory decree is verified. Diligent search and inquiry have also been made to discover the names and whereabouts of all persons upon whom service of process would bind said corporations, and the same are specified as particularly [fol. 3] as are known to the plaintiffs and said affiant. Said corporations are not qualified to do business in the State of Florida and none of the officers, directors, general managers, cashiers, resident agents and business agents of said corporations can be found within the state of Florida, and for this reason constructive service of process is sought upon said corporation, as provided by the statutes of the state of Florida.

The above named corporate defendants are named as defendants in their individual corporate capacities and as trustees representing various trusts as disclosed by this bill for declaratory decree, in order that they may be bound by any decree entered by this court, not only in their capacities as trustees, but also in their individual corporate capacities.

The defendant, Benedict H. Hanson, is a resident of the state of New York, now residing at 510 Park Avenue, New York, N. Y., Apartment B-4.

The defendant, John Stewart, is a resident of the state of Pennsylvania, now residing on Beachwood Road, Rosemont, Pennsylvania.

The defendant, Dora Browning Stewart Lewis, is a resident of the state of Maryland, now residing at 7000 Glendale, Chevy Chase, Maryland.

The defendant, Mary Washington Stewart Borie, is a resident of the state of Ohio, now residing at 6912 Madisonville Road, Marimont, Cincinnati, Ohio.

The defendant, Miriam V. Moyer, is a resident of the state of Pennsylvania, now residing at 1719 Fidelity Trust Building, Philadelphia, Pennsylvania.

[fol. 4] The defendant, James Smith, is a resident of the state of Pennsylvania, now residing at 221 Williams Road, Rosemont, Pennsylvania.

The defendant, Dora Donner Ide, is a resident of the state of New York, now residing at 485 Park Avenue, New York, N. Y.

The defendant, Paula Browning Denckla, is a minor, now twenty years of age. She resides at 5 East 67th Street, New York, N. Y.

The defendant, William Donner Denckla, is a minor, now nineteen years of age. He resides at 5 East 67th Street, New York, N. Y.

Said two minors, Paula Browning Denckla and William Donner Denckla, are the children of the plaintiff, Katherine N. R. Denckla.

Diligent search and inquiry have been made to discover the names and residences of the above named non-resident defendants, and the same are set forth above in this bill for declaratory decree as particularly as are known to the plaintiffs and to the affiant making the affidavit by which this bill for declaratory decree is verified. Constructive service of process on said non-resident defendants is sought, as provided by the statutes of the state of Florida.

The defendant, William Donner Roosevelt, is a resident of Palm Beach County, residing at South Ocean Boulevard, Palm Beach, Florida, and is more than twenty-one years of age.

The defendants, Donner Hanson and Joseph Donner Winsor, are both minors, and they reside in Palm Beach

County with their mother, Elizabeth Donner Hanson, on South Ocean Boulevard, Palm Beach, Florida.

[fol. 5] The defendant, Walter Hamilton, is a resident of Palm Beach County, Florida, and is more than twenty-one years of age.

The defendant, Elizabeth Donner Hanson, is made a party defendant individually and as executrix of the will of Dora Browning Donner, deceased. The said Elizabeth Donner Hanson is a single woman residing on South Ocean Boulevard, Palm Beach, Florida, and is a resident of Palm Beach County, Florida.

2.

Dora Browning Donner died a citizen and resident of Palm Beach County, Florida, on November 20, 1952, leaving a Last Will and Testament dated December 3, 1949, a copy of which is hereto attached and made a part hereof and marked Exhibit "1". Said will was duly admitted to probate in the County Judge's Court in and for Palm Beach County, Florida, on December 23, 1952. At the date of her death and at all times subsequent to January 15, 1944, decedent had been a resident of and domiciled in Palm Beach County, Florida. Prior to taking up her domicile in Florida, she had been a resident and citizen of the State of Pennsylvania, and had been a resident of that state since prior to 1935. At all times subsequent to January 15, 1944 and up to the date of her death, decedent paid intangible taxes assessed in Palm Beach County, Florida, upon all of the intangibles forming a part of the assets of the trust described in the next paragraph of this bill for declaratory decree.

3.

On March 25, 1935, said Dora Browning Donner, then residing in Villa Nova, Pennsylvania, executed a trust agreement in which the defendant, Wilmington Trust Company, a Delaware corporation, was named as trustee. A [fol. 6] copy of said trust agreement is hereto attached and made a part thereof and marked exhibit 2. Said trust agreement, under its terms, existed only for the life of

the said Dora Browning Donner, and it provided that at her death the trust property described in said trust agreement would be disposed of as provided under the terms of her last will and testament, unless prior to her death she had executed a valid power of appointment making a different disposition of part or all of the trust property described in schedule "A" attached to said trust agreement. Said trust agreement contained the following provision:

"1. Trustee shall hold, manage, invest and reinvest the trust fund, collect the income thereof and pay out of such income all taxes, charges and expenses payable thereout including compensation to Trustee as hereinafter provided.

"Trustee shall pay over the net income of the trust fund unto Trustor, for and during the term of her natural life. Upon the death of Trustor Trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee, or failing such instrument, by her last Will and Testament, or in default of any such appointment then unto the then living issue of Trustor, per stirpes and not per capita."

[fol. 7] 4.

Said Dora Browning Donner attempted to exercise the power of appointment reserved, as shown in the above quotation, and executed an alleged power of appointment, dated April 6, 1935, a copy of which is hereto attached and made a part hereof and marked exhibit 3. By the terms of said alleged power of appointment the said Dora Browning Donner attempted to provide for certain payments to be made to her executors and also

$5,000.00 to be paid to the defendant, Bryn Mawr Hospital;

$10,000.00 to be paid to the defendant, John Stewart;

$10,000.00 to be paid to Louisville Trust Company, as trustee, for the benefit of the defendant, Dora Browning Stewart, now Dora Browning Stewart Lewis;

$10,000.00 to be paid to Louisville Trust Company as trustee, for the benefit of the defendant, Mary Washington Stewart, now Mary Washington Stewart Borie;

$10,000.00 to be paid to the defendant, Louisville Trust Company, as trustee, for the benefit of the defendant, Paul Browning Denckla;

$10,000.00 to be paid to the defendant, Louisville Trust Company, as trustee, for the benefit of the defendant, William Donner Denckla;

$10,000.00 to be paid to the defendant, Louisville Trust Company, as trustee, for the benefit of the defendant, William Donner Roosevelt;

$10,000.00 for each grandchild of said trustor Dora Browning Donner, born after the date of said alleged power of appointment, April 6, 1935;

[fol. 8] and the balance of said trust to be divided into two equal parts, to be paid one-half to the defendant, Wilmington Trust Company, as trustee, for the benefit of the plaintiff, Katherine N. R. Denckla, who was named in the will of the deceased as Katherine N. R. Denckla Ordway, but whose name is now Katherine N. R. Denckla, and the other one-half to the defendant, Wilmington Trust Company, as trustee, for the benefit of the defendant, Dorothy Browning Stewart, all as shown by said alleged power of appointment above described as exhibit 3 and attached to this bill for declaratory decree and made a part hereof.

5.

By virtue of said power retained by the said Dora Browning Donner in the trust instrument dated March 25, 1935;

which provided that the last instrument in writing executed by her as a power of appointment would control the disposition of said trust assets, she again attempted to exercise her power of appointment on October 11, 1939, and in said attempted power of appointment she revoked and cancelled paragraph C of the power of appointment dated April 6, 1935, providing $10,000.00 for the defendant, John Stewart, and increased the amount for said John Stewart to $15,000.00, and added $1,000.00 for James Smith. A copy of said alleged power of appointment is hereto attached and made a part hereof and marked exhibit 4.

6.

Thereafter, the said Dora Browning Donner again attempted to exercise said alleged power of appointment contained in said trust instrument dated March 25, 1935, providing that the last instrument in writing executed by her would control said trust assets, and she executed an alleged power of appointment designated "*Donner *First Power of Appointment,*" dated December 3, 1949. In this alleged power of appointment she revoked all previous [fol. 9] exercises of said power of appointment, the same being those above mentioned, dated April 6, 1935, and later amended by the one dated October 11, 1939. She then provided in said alleged power of appointment, designated as "Donner * First Power of Appointment," for the disposition of said trust assets as follows:

$ 2,000.00 to the defendant, Miriam V. Moyer;

$ 1,000.00 to the defendant, James Smith;

$ 1,000.00 to the defendant, Walter Hamilton;

$ 1,000.00 to each of her servants who had been in her employ for more than two years at the time of her death;

$10,000.00 to the defendant, Louisville Trust Company, as trustee, for the benefit of the defendant, Benedict H. Hanson;

$10,000.00 to the defendant, Bryn Mawr Hospital, Bryn Mawr, Pennsylvania, to endow a bed in honor of Dorothy B. Rodgers Stewart;

$200,000.00 to the defendant, Delaware Trust Company, as trustee, for the benefit of Joseph Donner Winsor;

$200,000.00 to the defendant, Delaware Trust Company, as trustee, for the benefit of the defendant, Donner Hanson.

Said alleged power of appointment then provided that the residue of the principal and undistributed income of said trust should be paid to the executrix of the last will and testament of the said Dora Browning Donner. A copy of said alleged power of appointment, described as "Donner [fol. 10] * First Power of Appointment," is hereto attached and made a part hereof and marked exhibit 5.

7.

Thereafter, the said Dora Browning Donner, by reason of the provision in said trust instrument, dated March 25, 1935, providing that the last instrument in writing which she should execute would control the disposition of said trust assets, again attempted to exercise said alleged power of appointment by executing a written instrument, dated July 7, 1950, and designated *"Donner * Second Power of Appointment."* In this alleged power of appointment she revoked the $10,000.00 to the defendant, Louisville Trust Company, as trustee, for the benefit of her son-in-law, Benedict H. Hanson, and she confirmed her alleged power of appointment dated December 3, 1949, in all other respects. A copy of said last alleged power of appointment is hereto attached and made a part hereof and marked exhibit 6.

8.

The defendant, Elizabeth Donner Hanson, is the executrix of the will of said deceased, a copy of which is attached to this bill for declaratory decree as exhibit 1, and she is made a party defendant for the purpose of binding her as

such executrix, and also binding her individually as to any rights that she may have as a result of the will, the trust agreement, and the alleged powers of appointment hereinabove mentioned.

Dora Donner Ide is made a party defendant by reason of the fact that she is named as a legatee in said will and in order to bind her by the terms and provisions of the decree to be entered in this case pertaining to the will, the trust instrument, and the powers of appointment hereinabove mentioned.

[fol. 11] The Donner Corporation, a Pennsylvania Corporation, is made a party defendant by reason of the fact that item *Eighth* of said will names it as the sole adviser of the trustee ~~for the trust~~ created in said will, and in order that it may be bound by the terms of the decree to be entered in this case with reference to said will, trust agreement, and powers of appointment hereinbefore mentioned.

In Item I of the first alleged power of appointment, dated April 6, 1935, and attached as exhibit 3 to this bill for declaratory decree, the trustor provided $10,000.00 for each grandchild of the trustor born after April 6, 1935. Plaintiff alleges that all grandchildren born to said trustor after that date have been made parties defendant in this case.

In Item (iv) of the power of appointment known as "Donner * First Power of appointment," dated December 3, 1949, attached as exhibit 5 to this bill for declaratory decree, provision is made for $1,000.00 to be paid to each servant who shall have been in the employment of the trustor, Dora Browning Donner, for a period of more than two years prior to her death. Plaintiffs allege that there are no such servants, and for that reason none are made parties defendant in this case.

9.

Plaintiffs allege that questions and doubts have arisen concerning what property passes under the residuary clause of the Last Will and Testament of the decedent, Dora Browning Donner, particularly that part of the residuary clause which purports to cover property over which the decedent had powers of appointment and which she had

failed to exercise effectively in her lifetime. If, as to the trust described in paragraph numbered 3 of this bill for [fol. 12] declaratory decree, the decedent, during her lifetime, effectively and validly exercised powers of appointment thereunder, only a portion of property in such trust passes under the residuary clause. If, on the other hand, one or more of the exercises of power of appointment shown on Exhibits 3, 4, 5, and 6, attached to this bill for declaratory decree, were ineffective or invalid for any reason, then additional portions of the trust property passes under the residuary clause of the decedent's will.

In this connection plaintiffs respectfully allege that each of the several alleged exercises of powers, shown on Exhibits 3, 4, 5, and 6, attached to this bill for declaratory decree, is testamentary in character and each provides it is not to take effect until after the death of the settlor, the said Dora Browning Donner. Thus, since each is testamentary in form, each must be executed in the manner required by the applicable law for testamentary dispositions. Questions have arisen as to which is the proper law to be applied; whether the law of Pennsylvania where the settlor resided at the time the trust was created and at the time the first two of the exercises were made, or the law of Florida to which she later moved her domicile and where she exercised the last two alleged powers of appointment above mentioned, or the law of Delaware where the trustee has its place of business, the law of each of such states varying on the point in question, Florida and Delaware requiring two witnesses for testamentary dispositions and Pennsylvania none. Revocation of a testamentary instrument may also be made under the laws of Pennsylvania by an unattested written instrument signed by a testator. In the case of each of the exercises here in question, there was only one witness.

Unless the Court shall by its decree determine what portion of the trust property passes under the residuary clause of the decedent's will, plaintiffs are without remedy; simi- [fol. 13] larly, if any such exercises are invalid, whereby certain property of the trust become assets of the residuary estate of the decedent, it is important to capture the same for the benefit of the estate prior to the discharge of the

defendant executrix who has failed to take any steps to do so, and who takes the position that all of such exercises are valid and fully effective.

Wherefore, Plaintiffs pray:

1. That the Court construe and determine the question of what portion of the trust property involved herein passes under the residuary clause of the will of the decedent.

2. That the Court grant such further or supplemental relief as may be necessary or proper.

C. Robert Burns, Redfearn & Ferrell, By D. H. Redfearn, Attorneys for Plaintiffs.

Duly sworn to by Elwyn L. Middleton, jurat omitted in printing.

[fol. 14] EXHIBIT 1 TO BILL FOR DECLARATORY DECREE

I, DORA BROWNING DONNER, of Palm Beach, Florida, do make, publish and declare this as and for my Last Will and Testament, hereby revoking and making void any and all Wills by me at any time heretofore made.

FIRST: I order and direct that all my just debts and funeral expenses be paid as soon after my death as conveniently may be

SECOND: It is my desire that I be buried in St. David's Cemetery, Radnor, Pennsylvania, next to the grave of my son, William H. Donner, Jr.

THIRD: I direct my Executrix to see that an appropriate marker be placed on my grave.

FOURTH: I gave and bequeath all of my personal and household effects, including clothing, jewelry, silverware, furniture and automobiles, unto my daughters, ELIZBETH DONNER HANSON and DORA DONNER IDE, or the survivor of them, to be divided between them, if both are living, as they may agree.

FIFTH: All the rest, residue and remainder of my estate, real, personal and mixed, whatsoever and wheresoever the same may be at the time of my death, including any and all property, rights and interest over which I may have power of appointment which prior to my death has not been effectively exercised by me or has been exercised by me in favor of my Executrix, I direct my Executrix to deal with as follows, namely:

(a) Thereout to pay all estate, inheritance, transfer or other succession taxes or death duties, State and Federal, which by reason of my death shall become payable upon or with respect to the property appointed by me by exercise of the power of appointment provided in my favor in paragraph 1 of a certain trust agreement entered into between [fol. 15] me and Wilmington Trust Company, a Delaware corporation, as trustee on the 25th day of March, 1935;

(b) To divide the balance into two equal parts;

And I give and bequeath one of said parts to Delaware Trust Company, a corporation of the State of Delaware, its successors and assigns, trustee of a certain trust dated August 6, 1940, numbered 8555, for the benefit of my daughter KATHERINE N. R. DENCKLA ORDWAY, to be held, administered and/or distributed by it subject to all the trusts, uses, terms and conditions set forth in said trust;

I give and bequeath the remaining part unto my Executrix, IN TRUST, NEVERTHELESS, during the lifetime of my daughter DOROTHY B. RODGERS STEWART, to hold, manage, invest and re-invest the balance, to collect the income thereof and, after paying out of such income all charges and expenses properly payable therefrom, to apply the next income therefrom and/or a part of the principal thereof to the support and maintenance, benefit and/or comfort of my said daughter DOROTHY B. RODGERS STEWART, in such amounts, at such times and in such manner as my daughter, KATHERINE N. R. DENCKLA ORDWAY and after her death, the person occupying the office of Treasurer of The Donner Corporation, shall direct, and to accumulate and add to the principal the balance of such net income not so applied; and upon the death of my said daughter DOROTHY B.

RODGERS STEWART, or upon my death if she do not survive me, to pay over the remaining principal and undistributed income, if any; unto said Delaware Trust Company, its successors and assigns, trustee of said trust dated August 6, 1940, numbered 8555, for the benefit of my said daughter KATHERINE N. R. DENCKLA ORDWAY, to be held, administered and/or distributed by it subject to all trusts, uses, terms and conditions set forth in said trust numbered 8555.

[fol. 16] SIXTH: I authorize and empower the Executrix of this my Will and the Trustee of the trust herein created, in her discretion:

(a) To retain any and all stocks, bonds, notes, securities and/or other property constituting my estate immediately after my death, without liability for any decrease in value thereof.

(b) To sell at public or private sale, exchange for like or unlike property, convey, lease for terms longer or shorter than the trust, and otherwise dispose of any or all property, real or personal, held in the estate by her administered, for such price and upon such terms and credits as may be deemed proper.

(c) To hold uninvested any money available for investment in the trust fund or to invest such money in such stocks, bonds, notes, securities and/or other property as may be deemed appropriate for the trust fund, irrespective of the rules of investment applying to trustees under any present or future laws of any jurisdiction and without any duty to diversify investments.

(d) To participate in any plan or proceedings for protecting or enforcing any right, obligation or interest arising from any stock, bond, note or security held in the estate by her administered, or for reorganizing, consolidating, merging, or adjusting the finances of any corporation issuing the same, to accept in lieu thereof any new or substituted stocks, bonds, notes, and/or securities, whether of the same of a different kind or class, or with different priorities, rights or privileges, to pay any assessment or any expense incident thereto, and to do any other act or thing that may be deemed necessary or advisable in connection therewith.

(e) To borrow money for such periods of time and upon [fol. 17] such terms or conditions as may be deemed advisable for the purpose of paying any taxes chargeable to the estate by her administered, or for the purpose of taking up subscription rights accruing upon any stock or security held therein, or for the protection preservation or improvement of the estate by her administered, and she may mortgage or pledge such part or the whole of such estate as may be required to secure such loan or loans.

(f) To vote directly or by proxy at any election or stockholders' meeting any shares of stock held hereunder.

(g) To pay any legacy and to make any division or distribution of the estate by her administered in cash or in kind, or partly in cash and partly in kind, and to value and apportion the property to be so divided or distributed, which valuation and apportionment shall be final and conclusive upon all persons and corporations interested therein.

(h) To retain any and all property constituting the trust funds in bearer form, or in her own name, or in the name of her nominee or nominees, without disclosing any fiduciary capacity; and her liability as Executrix and/or Trustee shall be neither increased nor decreased thereby.

SEVENTH: The executrix of this my Will and/or the Trustee of the trust herein created shall exercise the powers heretofore granted to her in subdivisions (b) to (f) of Paragraph SIXTH hereof only upon the written direction of or with the written consent of the adviser hereinafter named; provided, however, if at any time there shall be no adviser or if the adviser shall fail to give any written direction or to communicate in writing to said Executrix and/or Trustee its consent or disapproval as to the exercise of any of the aforesaid powers, for which exercise the direction or consent of such adviser shall be necessary, within ten days after said Executrix and/or Trustee shall have sent to the adviser, by registered mail at its last known address, a [fol. 18] written request for such consent, then the Executrix and/or Trustee is hereby authorized and empowered to take such action in the premises as she, in her discretion,

shall deem to be for the best interest of the beneficiary or beneficiaries of the trust created hereunder.

EIGHT: The Donner Corporation, a corporation of the Commonwealth of Pennsylvania, shall be the sole adviser of the trust herein created. My said adviser shall be paid annually by my Trustee a reasonable fee in an amount to be agreed upon by my adviser and Trustee in compensation of its services and expenses as such adviser.

NINTH: I direct that:

(a) No person or corporation dealing with the Executrix of this Will and/or the Trustee of the trust herein created shall be obliged to see to the application of any money paid or property delivered to such Executrix or Trustee, or to inquire into the necessity or propriety of such Executrix or trustee exercising any of the powers herein conferred upon her, or to determine the existence of any fact upon which such Executrix' or Trustee's power to perform any act hereunder may be conditioned.

(b) The principal of my estate or of the trust herein created shall be credited with any stock dividends or subscription rights or distribution of principal or discounts received on investments from time to time held as a part hereof, and such principal shall likewise be charged with any premium on any such investments.

(c) My said Trustee shall not create or accumulate any sinking fund to offset any premiums at which she may make purchases of securities in the trust estate herein created.

LASTLY: I hereby nominate and appoint my daughter, ELIZABETH DONNER HANSON, to be the Executrix of this my Last Will and Testament, and direct that she be not required to give bond with surety before receiving letters [fol. 19] testamentary on my estate.

IN WITNESS WHEREOF, I, the said DORA BROWNING DONNER, have hereunto set my hand and seal this third day of December in the year of our Lord, one thousand nine hundred and forty-nine (1949).

/s/ DORA B. DONNER

Signed, sealed, published and declared by the above named DORA BROWNING DONNER as and for her Last Will and Testament, in our presence, who, in her presence, at her request, and in the presence of each other, have hereunto set our hands as witnesses, the day and year last aforesaid.

/s/ DOROTHY DOYLE R.N.
4527 Frankford Ave., Phila., Pa.

/s/ LYDE MACFARLAND
1028 E. Elm Street
Conshohocken, Pa.

[fol. 20] EXHIBIT 2 TO BILL FOR DECLARATORY DECREE

THIS AGREEMENT, made this 25th day of March, A. D., 1935, between DORA BROWNING DONNER, of Villa Nova, Pennsylvania, party of the first part, hereinafter called "Trustor", and WILMINGTON TRUST COMPANY, a corporation of the State of Delaware, party of the second part, hereinafter called "Trustee", WITNESSETH:

WHEREAS, Trustor desires to establish a trust of certain securities and property described in "Schedule A" annexed hereto and made a part hereof, which securities and property, together with the investments, reinvestments and proceeds thereof, and such other securities and property as may hereafter be received by Trustee hereunder, are hereinafter called the "trust fund":

NOW, THEREFORE, in consideration of the premises, the mutual covenants hereinafter set forth and the sum of One Dollar ($1.00) by Trustee to Trustor in hand paid, the receipt whereof is hereby acknowledged, Trustor has assigned, transferred and delivered, and by these presents does assign, transfer and deliver the securities and property described in said "Schedule A" unto Trustee and its successors, IN TRUST, NEVERTHELESS, for the following uses, intents and purposes, that is to say:

1. Trustee shall hold, manage, invest and reinvest the trust fund, collect the income thereof and pay out of such income all taxes, charges and expenses payable thereout including compensation to Trustee as hereinafter provided.

Trustee shall pay over the net income of the trust fund unto Trustor, for and during the term of her natural life. Upon the death of Trustor Trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such [fol. 21] person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee, or failing such instrument, by her last Will and Testament, or in default of any such appointment then unto the then living issue of Trustor, per stirpes and not per capita.

In the event of the death of the said Trustor without having exercised the power of appointment hereinbefore upon her conferred, and without leaving surviving her any issue of hers, then upon the death of the said Trustor, Trustee shall assign, transfer, convey and deliver the trust fund, principal and undistributed income thereof unto the next of kin of said Trustor.

2. Subject to the provisions and limitations herein expressly set forth, Trustee shall have, in general, the power to do and perform any and all acts and things in relation to the trust fund in the same manner and to the same extent as an individual might or could do with respect to its own property. No enumeration of specific powers herein made shall be construed as a limitation upon the foregoing general power, nor shall any of the powers herein conferred upon Trustee be exhausted by the use thereof, but each shall be continuing.

Trustee is specifically authorized and empowered, in its sole discretion, except as hereinafter otherwise provided in paragraph "4" hereof:

(a) To retain any and all stocks, bonds, notes, securities and/or other property constituting the original trust fund or added thereto, without liability on the part of Trustee for any decrease in value thereof.

[fol. 22] (b) To sell at public or private sale, exchange for like or unlike property, convey, lease for terms longer or shorter than the trust, and otherwise dispose of any or all property, real or personal, held in the trust fund, for such price and upon such terms and credits as Trustee may deem proper.

(c) To invest the proceeds of any such sale or sales, and any other money available for investment, in such stocks, bonds, notes, securities and/or other income producing property as may be deemed appropriate for this trust fund, irrespective of the rules of investment applying to trustees under any present or future laws of the State of Delaware or elsewhere.

(d) To vote directly or by proxy at any election or stockholders' meeting any shares of stock held hereunder.

(e) To participate in any plan or proceeding for protecting or enforcing any right, obligation or interest arising ~~from any stock, bond, note or security held in the trust fund,~~ or for reorganizing, consolidating, merging or adjusting the finances of any corporation issuing the same, to accept in lieu thereof any new or substituted stocks, bonds and/or securities, to pay any assessment or any expense incident thereto, and to do any other act or thing that Trustee may deem necessary or advisable in connection therewith.

(f) To determine whether expenses and other disbursements shall be charged against principal or income, or partly against principal and partly against income, and such determination shall be conclusive upon all persons and corporations interested therein.

(g) To take and to hold any security or other property constituting a part of the trust fund, in bearer form or in its own name or in the name of its nominee or nominees, without disclosing its fiduciary capacity, and Trustee's [fol. 23] liability shall be neither increased nor decreased thereby.

3. Trustor and/or any other person may at any time and from time to time add to the trust fund by devising, bequeathing, assigning, transferring, conveying, delivering

or making payable to Trustee cash, securities, provided such securities are fully paid and non-assessable, and/or other property and all such cash, securities and/or property shall be held by Trustee subject to the terms of this trust.

4. Trustee shall exercise the powers hereinbefore granted to it in subdivisions (b), (c) and (e) of Paragraph "2" hereof only upon the written direction of, or with the written consent of the adviser of the trust; provided, however, that if at any time during the continuance of this trust there shall be no adviser of the trust, or if the adviser of the trust shall fail to give any written direction or to communicate in writing to Trustee his or her consent or disapproval as to the exercise of any of the aforesaid powers for which exercise the direction or consent of such adviser shall be necessary, within ten days after Trustee shall have sent to the adviser of the trust, by registered mail, at his or her last known address, a written request for such consent, then Trustee is hereby authorized and empowered to take such action in the premises as it, in its sole discretion shall deem to be for the best interest of the beneficiary of this trust.

5. The adviser of the trust shall be William H. Donner, husband of Trustor, or such other person or persons as Trustor may nominate in writing delivered to Trustee during her lifetime; and such other person or persons so nominated shall become the adviser or advisers of this trust at such time and upon the happening of such conditions as the said Trustor may specify in writing.

[fol. 24] 6. No person or corporation dealing with Trustee shall be obliged to see to the application of money paid or property delivered to Trustee, to inquire into the necessity or the propriety of Trustee exercising any of the powers herein conferred upon it, or to determine the existence of any fact upon which Trustee's power to perform any act hereunder may be conditioned.

7. Any stock dividends or subscription rights or distribution of principal which may be received by Trustee on investments from time to time held by it hereunder shall be added to and form a part of the principal of said trust fund and shall be subject to the trust herein created.

8. Trustee shall charge all premiums and credit all discounts on investments against or to principal, as the case may be, but not against or to income; and Trustee shall not be required to create any reserve out of income for depreciation, obsolescence, amortization or other waste of principal.

9. Trustee shall be liable only for acts or omissions done or permitted to be done by it hereunder in bad faith, but shall not be liable for acts or omissions done or permitted to be done in good faith.

10. Trustor reserves the right to amend, alter or revoke this agreement in whole or in part at any time or times by written instrument signed by the principal and delivered to Trustee; provided, however, that the duties, powers, liabilities and compensation of Trustee hereunder shall not be substantially changed without its written consent.

11. ~~The Trustor shall have the right to change from~~ time to time the Trustee hereunder, to any successful Trust Company (of any state) that has been in business not less than ten years and has capital and surplus of not less than three million dollars; and in the event this right to change the Trustees is exercised, the Trustee then in office shall [fol. 25] be entitled to ninety days prior notice in writing, unless such notice is waived by it; whereupon the said retiring Trustee shall transfer, assign and deliver all the moneys, securities and properties then subject hereto to such Trustee as shall be then designated, which successor Trustee shall hold the said trust subject to all the conditions herein, to the same effect as though now named herein, and the retiring Trustee, having fully accounted, shall be relieved after such delivery, transfer and assignment from all and every liability on account of all matters pertaining to the execution of the trust.

12. It is hereby agreed that Trustee shall receive as compensation for its services percentum of the gross income received by it from said trust fund and upon distribution of a part or all of said trust fund Trustee shall receive a sum equivalent to one percentum of the principal

so distributed. Trustee shall also be entitled to receive a reasonable compensation for any extraordinary services performed by it hereunder.

13. Trustee accepts this trust and agrees to perform same in accordance with its terms and conditions.

IN WITNESS WHEREOF, DORA BROWNING DONNER, Trustor, has hereunto set her Hand and Seal, and WILMINGTON TRUST COMPANY, Trustee, has caused this agreement to be signed in its name by one of its Vice-Presidents and its corporate seal to be hereunto affixed by one of its Assistant Secretaries, all done in duplicate on the day and year first above written.

WITNESS: ..... (seal)

.....

WILMINGTON TRUST COMPANY

BY

Vice-President

ATTEST

Asst. Secy.

[fol. 26] SCHEDULE A TO EXHIBIT 2

112	30/50	shares American Gas & Electric Company
25	shares	American Steamship Company Capital
30	"	Consolidated Gas Company of New York Common
10	"	The Horn & Hardart Company Capital
100	"	Lone Star Gas Corporation 6½% Preferred
5	"	Mission Corporation Common
100	"	Standard Oil Company of New Jersey Capital
478	"	Sun Oil Company 6% Preferred
160	"	United States Steel Corporation Common
$2,000		City of Camden, New Jersey Harbor Improvement 5½'s, due August 1, 1956

$7,000 Crucible Steel Company of America Debenture 5's due May 1, 1940

$16,000 Donner Steel Co. Inc. First Refunding 7's "A" due January 1, 1942

$15,000 Goodell Realty Corporation First 6's
$ 1,000 due October 1, 1940
2,000 " April 1, 1941
10,000 " October 1, 1941
2,000 " April 1, 1942

$5,000 Lexington Water Power Company First 5's due January 1, 1968

$15,000 Lloyds Finance Corporation Guaranteed 6's, Series "A" due October 1, 1936

$20,000 City of Montgomery, Ala. Public Improvement Refunding 5½'s
$18,000 due July 1, 1958
2,000 " July 1, 1953

$15,000 New York Water Service Corporation First 5's "A" due November 1, 1951

[fol. 27] $100,000 City of Seattle, Wash. Municipal Light & Power Bond 1927 Series LU-1
$ 5,000 due October 1, 1938
3,000 " October 1, 1940
10,000 " October 1, 1943
12,000 " October 1, 1944
10,000 " October 1, 1945
10,000 " October 1, 1949
20,000 " October 1, 1953
25,000 " October 1, 1958
5,000 " October 1, 1959

$25,000 United States Rubber Co. 6½'s, Series "O", March 1, 1940

$15,000 West Virginia Water Service Co. 1st 5's "A", Aug. 1, 1951

[fol. 28] EXHIBIT 3 TO BILL FOR DECLARATORY DECREE

WHEREAS, I, the undersigned, DORA BROWNING DONNER, of Villa Nova, Pennsylvania, as Trustor, entered into a certain trust agreement with WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee on the 25th day of March, 1935; and

WHEREAS, paragraph 1 of said trust agreement provided among other things as follows:

> "Upon the death of Trustor Trustee shall assign transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee, . . ."

and

WHEREAS, I hereby desire to exercise the foregoing power of appointment which I reserved in said trust agreement:

NOW, THEREFORE, I, the undersigned, Dora Browning Donner, in consideration of the premises and the mutual covenants in said trust agreement dated March 25, 1935 set forth, do hereby exercise the power of appointment which I reserved in paragraph "1" of said trust agreement dated March 25, 1935, and in the exercise of same I do hereby direct Wilmington Trust Company, Trustee under said trust agreement dated March 25, 1935, upon my death, to hold, administer and/or distribute the principal and net income of the trust fund from and after my death as follows:

A:- To pay over unto the Executor or Executors of my estate such amount or amounts as such Executor or Executors may request in writing delivered to the Trustee of said trust dated March 25, 1935 prior to the expiration of six months after my death;

[fol. 29] B:- As soon as conveniently may be, to pay over the sum of Five Thousand Dollars ($5,000.00) unto the Bryn

Mawr Hospital of Bryn Mawr, Pennsylvania, to be used by said hospital to endow a bed for the benefit of young boys, said bed to be inscribed "In memory of William H. Donner, Jr., given by his mother, Mrs. Dora Browning Donner";

C:- As soon as conveniently may be to pay over the sum of Ten Thousand Dollars ($10,000.00) unto John Stewart, presently residing in Radnor, Pennsylvania, his heirs, executors, administrators or assigns;

D:- As soon as conveniently may be to pay over the sum of Ten Thousand Dollars ($10,000.00) unto Louisville Trust Company of Louisville, Kentucky, Trustee under agreement with William H. Donner dated September 28, 1934, for the benefit of Dora Browning Stewart, if said trust shall not have terminated prior to the date when such payment may be made, but if said trust shall have terminated prior to the date when such payment may be made then unto Dora Browning Stewart, if living, but if said Dora Browning Stewart shall not then be living then unto her then living issue, per stirpes and not per capita, or in default of any such issue then unto such person or persons as shall then be determined to be the distributees of Dora Browning Stewart under the intestacy laws of the State of Delaware in effect at the time of her death.

E:- As soon as conveniently may be to pay over the sum of Ten Thousand Dollars ($10,000.00) unto Louisville Trust Company of Louisville, Kentucky, Trustee under agreement with William H. Donner dated September 28, 1934, for the benefit of Mary Washington Stewart, if said trust shall not have terminated prior to the date when such payment may be made, but if said trust shall have terminated prior to the date when such payment may be made, then unto Mary Washington Stewart, if living, but [fol. 30] if said Mary Washington Stewart shall not then be living then unto her then living issue, per stirpes and not per capita, or in default of any such issue then unto such person or persons as shall then be determined to be the distributees of Mary Washington Stewart under the intestacy laws of the State of Delaware in effect at the time of her death.

F:- As soon as conveniently may be to pay over the sum of Ten Thousand Dollars ($10,000.00) unto Louisville Trust Company of Louisville, Kentucky, Trustee under agreement with William H. Donner dated September 28, 1934, for the benefit of Paula Browning Denckla, if said trust shall not have terminated prior to the date when such payment may be made, but if said trust shall have terminated prior to the date when such payment may be made then unto Paula Browning Denckla, if living, but if said Paula Browning Denckla shall not then be living, then unto her then living issue, per stirpes and not per capita, or in default of any such issue then unto such person or persons as shall then be determined to be the distributees of Paula Browning Denckla under the intestacy laws of the State of Delaware in effect at the time of her death.

G:- As soon as conveniently may be to pay over the sum of Ten Thousand Dollars ($10,000.00) unto Louisville Trust Company of Louisville, Kentucky, Trustee under agreement with William H. Donner dated December 22, 1934, for the benefit of William Donner Denckla, if said trust shall not have terminated prior to the date when such payment may be made, but if said trust shall have terminated prior to the date when such payment may be made then unto William Donner Denckla, if living, but if said William Donner Denckla shall not then be living, then unto his then living issue, per stirpes and not per capita, or in default of any such issue then unto such person or persons as shall then be determined to be the distributees of William Donner Denckla under the in- [fol. 31] testacy laws of the State of Delaware in effect at the time of his death.

H:- As soon as conveniently may be to pay over the sum of Ten Thousand Dollars ($10,000.00) unto Louisville Trust Company of Louisville, Kentucky, Trustee under agreement with William H. Donner dated December 22, 1934, for the benefit of William Donner Roosevelt, if said trust shall not have terminated prior to the date when such payment may be made, but if said trust shall have terminated prior to the date when such payment may be made then unto William Donner Roosevelt, if living, but

if said William Donner Roosevelt shall not then be living, then unto his then living issue, per stirpes and not per capita, or in default of any such issue then unto such person or persons as shall then be determined to be the distributees of William Donner Roosevelt under the intestacy laws of the State of Delaware in effect at the time of his death.

I:- As soon as conveniently may be, to set aside and hold in further trust hereunder the sum of Ten Thousand Dollars ($10,000.00) for each grandchild of Trustor that may be born after the date of this instrument but prior to the death of Trustor, as a separate trust fund, each of such separate trust funds, if any, to be held, administered and/or distributed as follows:

To apply the net income of the trust fund to the support, maintenance, benefit and/or education of such grandchild for whom such trust fund shall have been set aside in such manner and to such extent as Trustee, in its sole discretion, shall deem to be for the best interest of such grandchild until such grandchild shall have attained the age of twenty-one years, at which time, or if such grandchild shall have attained the age of twenty-one years at the time when such trust fund shall be for him or her set aside then upon the setting aside of such trust fund [fol. 32] Trustee shall assign, transfer, convey and deliver such trust fund, principal and undistributed income thereof, if any, free from this trust, unto such grandchild; Any application of such income as aforesaid may be made directly by Trustee, or by payment to the guardian of the person or such grandchild, or to the person with whom such grandchild shall reside, or directly to such grandchild, and any such application or payment shall be a full discharge to Trustee therefor.

In the event of the death of any grandchild of Trustor for whom a separate trust fund shall be set aside as hereinbefore provided prior to such grandchild receiving distribution thereof, then upon the death of such grandchild Trustee shall assign, transfer, convey and deliver such separate trust fund set aside for such grandchild of Trustor so dying unto such person or persons as shall

then be determined to be the distributees of such grandchild of Trustor so dying under the intestacy laws of the State of Delaware in effect at the time of the death of such grandchild.

J:- As soon as conveniently may be to pay over the balance of the trust fund, if any, after making all of the foregoing payments, as follows:

One-half thereof unto Wilmington Trust Company, Trustee under agreement with William H. Donner dated March 18, 1932 for the benefit of Katherine N. R. Denckla, if such trust shall not have terminated prior to the date when such payment may be made, but if such trust shall have terminated prior to the date when such payment may be made then unto Katherine N. R. Denckla, if living, but if said Katherine N. R. Denckla shall not then be living, then u to her then living issue, per stirpes and not per capita, or in default of any such issue then unto Dorothy Browning Stewart, if living, but if said Dorothy Browning Stewart shall not then be living, then unto her then living issue per stirpes and not per capita, or in [fol. 33] default of any such issue, then unto such person or persons as shall then be determined to be the distributees of Dorothy Browning Stewart under the intestacy laws of the State of Delaware in effect at the time of her death;

The remaining one-half thereof unto Wilmington Trust Company, Trustee under agreement with William H. Donner dated March 19, 1932 for the benefit of Dorothy Browning Stewart, if such trust shall not have terminated prior to the date when such payment may be made, but if such trust shall have terminated prior to the date when such payment may be made, then unto Dorothy Browning Stewart, if living, but if said Dorothy Browning Stewart shall not then be living, then unto her then living issue, per stirpes and not per capita, or in default of any such issue then unto such person or persons as shall then be determined to be the distributees of Dorothy Browning Stewart under the intestacy laws of the State of Delaware in effect at the time of her death.

I authorize and direct said Trustee to make any of the payments hereinbefore directed to be made in cash or in kind or partly in cash and partly in kind; to withhold in

whole or in part any payments directed to be made in paragraphs B to J inclusive until the expiration of six months but not later than twelve months after my death; and to make the payments hereinbefore directed to be made in the order in which they are set forth until all of the property held by it shall have been completely distributed,—none of said payments to be made unless and until all of the payments preceding it in the order in which they are set forth shall have been made in full.

I hereby reserve the right to revoke, alter, amend or modify in whole or in part the appointment herein made [fol. 34] of the property held by Wilmington Trust Company as Trustee under that certain agreement which I entered into with it on March 25, 1935.

In witness whereof, I, the said Dora Browning Donner, have hereunto set my hand and Seal this sixth day of April A. D. 1935.

/s/ Dora Browning Donner (Seal)

Witness:

/s/ J. E. Hansini

Wilmington Trust Company hereby acknowledges receipt of the foregoing exercise of power of appointment by Dora Browning Donner this 17th day of May A. D. 1935.

Wilmington Trust Company

By: /s/ Tilghman Johnston
Vice-President

Attest: (Seal)

/s/ A. W. Birch
Assistant Secretary

[fol. 33] EXHIBIT 4 TO BILL FOR DECLARATORY DECREE

WHEREAS, I, the undersigned, DORA BROWNING DONNER, as Trustor, entered into a certain trust agreement with WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee, on the 25th day of March, 1935; and

WHEREAS, Paragraph 1 of said trust agreement provided among other things as follows:

> "Upon the death of Trustor Trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee, . . ."

and

WHEREAS, by instrument in writing dated the 6th day of April, 1935 I exercised the foregoing power of appointment and in said instrument of writing I reserved the right to revoke, alter, amend or modify said exercise of said power of appointment in whole or in part; and

WHEREAS, I now desire to alter, amend and modify said exercise of said power of appointment dated the 6th day of April, 1935, and do hereby alter, amend and modify the same as follows:-

1: By revoking and canceling Paragraph C appearing on page 2 thereof and reading as follows:-

"C:- As soon as conveniently may be to pay over the sum of Ten Thousand Dollars ($10,000.00) unto John Stewart, presently residing in Radnor, Pennsylvania, his heirs, executors, administrators or assigns;"

and substituting in lieu thereof the following:-

"C:- As soon as conveniently may be to pay over the sum of Fifteen Thousand Dollars ($15,000.00) unto John Stewart, presently residing in Radnor, Pennsylvania, his heirs, executors, administrators or assigns, and the sum of

One Thousand Dollars ($1,000.00) unto James Smith, presently residing in Villanova, Pennsylvania, . . . his heirs, executors, administrators or assigns;"

I hereby ratify and confirm said exercise of said power of appointment dated the 6th day of April, 1935 in all other respects.

IN WITNESS WHEREOF, I, the said DORA BROWNING DONNER, have hereunto ~~set~~ my Hand and Seal this 11th day of October A. D. 1939.

/s/ DORA BROWNING DONNER (Seal)

WITNESS:

/s/ J. E. HANSINI

WILMINGTON TRUST COMPANY hereby acknowledges receipt of the foregoing alteration, amendment and modification of exercise of power of appointment dated April 6, 1935 by Dora Browning Donner this 11th day of October A. D. 1939.

WILMINGTON TRUST COMPANY

BY: /s/ WALTER J. LAIRD
Vice-President

(Seal)

ATTEST: /s/ A. W. BIRCH
Assistant Secretary

[fol. 37] EXHIBIT 5 TO BILL FOR DECLARATORY DECREE

DONNER* FIRST POWER OF APPOINTMENT

WHEREAS I, the undersigned, DORA BROWNING DONNER, as Trustor, entered into a certain trust agreement with WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee, on the 25th day of March, 1935 (hereinafter called the "trust agreement"); and

WHEREAS Paragraph 1 of the trust agreement provided among other things as follows:

"Upon the death of Trustor Trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee, . . . ";

and

WHEREAS by instrument in writing dated the 6th day of April, 1935, I exercised the power of appointment provided as aforesaid by the trust agreement but in said instrument I reserved the right to revoke, alter, amend or modify said exercise of said power of appointment in whole or in part; and

WHEREAS by instrument in writing dated the 11th day of October, 1939, I altered, amended and modified said exercise of said power of appointment; and

Whereas I now desire to revoke all exercises by me, previous to the date hereof, of said power of appointment:

THESE PRESENTS WITNESS THAT:

1. I do hereby revoke all exercises by me, previous to the date hereof, of the power of appointment provided as [fol. 38] aforesaid by the trust agreement, including, but not so as to restrict the generality of the foregoing, the exercise effected by the said instrument in writing dated the 6th day of April, 1935, as altered, amended and modified by the said instrument in writing dated the 11th day of October, 1939.

2. Exercising the said power of appointment provided as aforesaid by the trust agreement, I do hereby direct Wilmington Trust Company, trustee under the trust agreement, upon my death, to assign, transfer, convey and deliver the principal and undistributed income of the trust fund held by it under the trust agreement as follows, namely:-

(a) As soon as conveniently may be, to pay over

(i) The sum of Two thousand dollars to MIRIAM V. MOYER, of Philadelphia, Pennsylvania;

(ii) The sum of One thousand dollars to JAMES SMITH if he shall be in the employment of a member of my family at the time of my death;

(iii) The sum of One thousand dollars to WALTER HAMILTON:

(iv) The sum of One Thousand Dollars to each of my servants, other than the said Walter Hamilton, who shall have been in my employment for more than two years at the time of my death;

(v) The sum of Ten thousand dollars to Louisville Trust Company, a corporation of the Commonwealth of Kentucky, its successors and assigns, IN TRUST, NEVERTHELESS, to hold, manage, invest and reinvest the same, to collect the income thereof and after paying out of such income all charges and expenses properly payable therefrom, including a reasonable compensation to my said Trustee, to pay the net income of this trust fund to my son-in-law Bene-[fol. 39] dict H. Hanson during the remainder of his lifetime and upon the death of my said son-in-law, I direct my said Trustee to pay the principal and undistributed income, if any, of the trust unto the Delaware Trust Company, a corporation of the State of Delaware, its successors and assigns, Trustee of a certain trust dated November 26th, 1948, numbered 9023, created by my daughter Elizabeth Donner Hanson, for the benefit of my grandson, Donner Hanson, to be held administered and/or distributed by it subject to all the trusts, uses, terms and conditions set forth in said trust.

(vi) To the BRYN MAWR HOSPITAL, of Bryn Mawr, Pennsylvania, the sum of Ten thousand dollars, to be used by said hospital to endow a bed to be inscribed "In honor of Dorothy B. Rodgers Stewart, given by her mother Mrs. Dora Browning Donner";

(vii) The sum of Two hundred thousand dollars to Delaware Trust Company, a corporation of the State of Delaware, its successors and assigns, trustee of a certain trust

dated November 26, 1948, numbered 9022, created by my daughter Elizabeth Donner Hanson for the benefit of my grandson JOSEPH DONNER WINSOR, to be held, administered and/or distributed by it subject to all the trusts, uses, terms and conditions set forth in said trust numbered 9022; and the further sum of Two hundred thousand dollars to Delaware Trust Company, a corporation of the State of Delaware, its successors and assigns, trustee of a certain trust dated November 26, 1948, numbered 9023, created by my daughter Elizabeth Donner Hanson for the benefit of my grandson DONNER HANSON, to be held, administered and/or distributed by it subject to all the trusts, uses, terms and conditions set forth in said trust numbered 9023;

(b) As soon as conveniently may be, to pay the residue of the principal and undistributed income of the said trust fund held by it under the trust agreement to the Executrix of my Last Will and Testament to be dealt with by her in [fol. 40] accordance with the terms and conditions of my said Last Will and Testament and any Codicil thereto.

I authorize and direct said Wilmington Trust Company to make all the payments hereinbefore directed to be made in cash or in kind or partly in cash and partly in kind; to withhold in whole or in part any payments directed to be made until the expiration of six months but not later than twelve months after my death; and to make the payments hereinbefore directed to be made in the order in which they are set forth until all of the property held by it shall have been completely distributed, none of said payments to be made unless and until all of the payments preceding it in the order in which in this instrument they are set forth shall have been made in full.

IN WITNESS WHEREOF I, the said Dora Browning Donner, have set hereto my hand and seal this 3rd day of December, A.D. 1949.

Witness:

Dorothy A. Doyle, R.N. Dora B. Donner

Delivery of the foregoing instrument in writing dated the 3rd day of December, A. D. 1949, executed by Dora Browning Donner, has been made to Wilmington Trust Company this 21st day of December A. D. 1949.

WILMINTON TRUST COMPANY

By: Jos. W. Chevin, Jr.
Vice-President & Trust Officer

Attested: J. Y. JEANES, JR.
Assistant Secretary

[fol. 41] EXHIBIT 6 TO BILL FOR DECLARATORY DECREE

DONNER* SECOND POWER OF APPOINTMENT

WHEREAS I, the undersigned, DORA BROWNING DONNER, as Trustor, entered into a certain trust agreement with WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee, on the 25th day of March, 1935 (hereinafter called the "trust agreement"); and

WHEREAS Paragraph 1 of the trust agreement provided among other things as follows:

> "Upon the death of Trustor Trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee, . . . ";

and

WHEREAS by instrument in writing dated the 3rd day of December 1949, I exercised the power of appointment provided as aforesaid by the trust agreement after revoking all exercises by me, previous to the date thereof, of said power of appointment; and

WHEREAS I now desire to partially revoke the said instrument in writing dated the 3rd day of December 1949 by which I exercised said power of appointment.

THESE PRESENTS WITNESS THAT:

1. I do hereby partially revoke said instrument in writing dated the 3rd day of December 1949 by the deletion therefrom of subsection (V) of Section (a) of Article 2 which reads as follows:—

[fol. 42] (V) The sum of Ten thousand dollars to Louisville Trust Company, a corporation of the Commonwealth of Kentucky, its successors and assigns, IN TRUST, NEVERTHELESS, to hold, manage, invest and reinvest the same, to collect the income thereof and after paying out of such income all charges and expenses properly payable therefrom, including a reasonable compensation to my said Trustee, to pay the net income of this trust fund to my son-in-law Benedict H. Hanson during the remainder of his lifetime and upon the death of my said son-in-law, I direct my said Trustee to pay the principal and undistributed income, if any, of the trust unto the Delaware Trust Company, a corporation of the State of Delaware, its successors and assigns, Trustee of a certain trust dated November 26th, 1948, numbered 9023, created by my daughter Elizabeth Donner Hanson, for the benefit of grandson, Donner Hanson, to be held administered and/or distributed by it subject to all the trusts uses, terms and conditions set forth in said trust.

2. In all other respects, I do hereby confirm the instrument in writing dated the 3rd day of December 1949 by which I exercised the said power of appointment provided as aforesaid by the trust agreement.

IN WITNESS WHEREOF, I, the said Dora Browning Donner, have set hereto my hand and seal this 7th day of July, A. D. 1950.

Witness:

GRACE E. WALKER DORA B. DONNER

[fol. 43] Delivery of the foregoing instrument in writing dated the 7th day of July, A. D. 1950, executed by Dora

Brown Donner, has been made to Wilmington Trust Company this 11th day of July A. D. 1950.

WILMINGTON TRUST COMPANY

By: JOSEPH RHOADS
Asst. Vice-Pres.

Attested:

W.M.W. (Illegible)
Asst. Sec.

[fol. 44] CLERK'S NOTE

On the 22nd day of January, 1954, Summons was issued, which, according to original Returns of Sheriff attached thereto, was served January 29th, 1954, on William Donner Roosevelt, Donner Hanson, Joseph Donner Winsor, and Elizabeth Donner Hanson, Individually and as executrix of the will of Dora Browning Donner, Deceased. Said Summons and the original Returns of the Sheriff were filed herein on February 9, 1954.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

NOTICE OF SUIT—Filed January 22, 1954

To: Wilmington Trust Company, in its individual corporate capacity and as trustee, Wilmington, Delaware;
Louisville Trust Company, in its individual corporate capacity and as trustee, Louisville, Kentucky;
Delaware Trust Company, in its individual corporate capacity and as trustee, Wilmington, Delaware;
Bryn-Mawr Hospital, in its individual corporate capacity and as trustee, Bryn-Mawr, Pennsylvania;
The Donner Corporation, a Pennsylvania corporation, 1710 Fidelity Trust Building, Philadelphia, Pennsylvania;

Benedict H. Hanson, 510 Park Avenue, Apartment B-4, New York, N. Y.;

John Stewart, Beachwood Road, Rosemont, Pennsylvania;

Dora Browning Stewart Lewis, 7000 Glendale, Chevy Chase, Maryland;

[fol. 45] Mary Washington Stewart Borie, 6912 Madisonville Road, Marimont, Cincinnati, Ohio;

Miriam V. Moyer, 1719 Fidelity Trust Building, Philadelphia, Pennsylvania;

James Smith, 221 Williams Road, Rosemont, Pennsylvania;

Dora Donner Ide, 485 Park Avenue, New York, N. Y.;

Paula Browning Denckla, 5 East 67th Street, New York, N. Y.;

William Donner Denckla, 5 East 67th Street, New York, N. Y.;

You and each of you are hereby notified that a bill for declaratory decree has been filed against you in the above styled case and you and each of you are required to file your answer thereto with the clerk of said court and to serve a copy thereof upon Burns, Middleton & Rogers, or Redfearn & Ferrell, attorneys for plaintiffs, whose addresses are shown below, on or before the 25th day of February, 1954, otherwise decree pro confesso will be entered against you.

Dated at West Palm Beach, Florida, January 22nd, 1954.

J. Alex Arnette, Clerk of said Circuit Court, By Thaddie P. Plant, Deputy Clerk.

(Seal of Clerk of Circuit Court)

C. Robert Burns, Harvey Building, West Palm Beach, Florida

and

Redfearn & Ferrell, 550 Brickell Avenue, Miami, Florida, Attorneys for Plaintiffs.

Publish: Palm Beach Times Jan. 23, 30; Feb. 6, 13, 1954.

[fol. 46] IN CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

ORDER APPOINTING GUARDIAN AD LITEM—February 16, 1954

This cause coming on to be heard on the motion of the defendant, Elizabeth Donner Hanson, for the appointment of a guardian ad litem for the minor defendants herein, Joseph Donner Winsor and Donner Hanson, and the Court being advised in the premises,

It Is Thereupon Ordered and Adjudged that said motion be and the same is hereby granted; that said Elizabeth Donner Hanson, mother and natural guardian of said minors be and she is hereby appointed guardian ad litem for the minor defendants, Joseph Donner Winsor and Donner Hanson.

It Is Further Ordered and Adjudged that said guardian ad litem shall make such defenses as she may deem proper to protect the interests of said minor defendants and that she shall serve and file such defenses on or February 18, 1954, the return date of the process served upon said minor defendants.

Done and Ordered in Chambers this 16 day of February, 1954.

C. E. Chillingworth, Circuit Judge.

[fol. 47] CLERK'S NOTE

On the 17th day of February, 1954, Proof of Publication of Notice of Suit, showing publication in the Palm Beach Times January 23, 30, February 6, 13, 1954, was filed and duly recorded in Chancery Order Book 230 at Page 610.

IN CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

MOTION OF ELIZABETH DONNER HANSON, ETC.—
Filed February 18, 1954

Come now the defendants, Elizabeth Donner Hanson, individually, as Executrix of the will of Dora Browning Donner, Deceased and as guardian ad litem for Donner Hanson and Joseph Donner Winsor, and William Donner Roosevelt, individually, by their undersigned attorneys and severally move the Court to dismiss this suit on the grounds:

1. The Court lacks jurisdiction over the subject matter in this suit for the following reasons. Defendants, Wilmington Trust Company and Delaware Trust Company, are corporations organized and operating as trust companies under the laws of the State of Delaware at Wilmington, Delaware. The Donner Corporation is a corporation organized and operating under the laws of the State of Pennsylvania at Philadelphia, Pennsylvania. None of said corporations have [fol. 48] any place of business in the State of Florida; nor are any of them transacting any business in this state; nor do any of them have any officers or agents in this state; nor have any of them been served with process in this state. There is no res in this state which would constitute a legal basis for constructive service upon any of them. The assets, which constitute the subject matter of this suit, are situated in the State of Delaware and no part thereof are or have ever been physically or constructively situated or located in this state. Long prior to the institution of this suit Wilmington Trust Company paid over and distributed to Delaware Trust Company, as Trustee, the assets of the trusts for the benefit of Joseph Donner Winsor and Donner Hanson described in the bill of complaint and paid over and distributed to Bryn-Mawr Hospital and the individual donees the cash given to them by the decedent, alleged in said bill of complaint. All of the assets of said trusts for the benefit of Joseph Donner Winsor and Donner Hanson are in the possession, custody and control of Delaware Trust Company in Wilmington, Delaware. Elizabeth Donner Hanson, as Executrix of the decedent's Estate, does not have and has

never had any possession, custody or control of any portion of aforesaid trust assets or cash gifts. These defendants are informed and believe that the defendants hereto sought to be served by constructive process will not submit themselves to the jurisdiction of this Court by appearing herein. The exercise by this Court of the jurisdiction sought to be invoked by the plaintiffs herein would contravene the Constitution and Laws of the State of Florida and the Constitution of the United States, and, in particular, Section 1 of the Fourteenth Amendment to the United States Constitution.

[fol. 49] 2. The Court lacks jurisdiction over the person of indispensable parties, for the foregoing reasons.

3. The purported process herein directed to indispensable parties is insufficient, for the foregoing reasons.

4. The purported service of process upon indispensable parties is insufficient, for the foregoing reasons.

5. The plaintiffs have failed to join indispensable parties by valid and legal process, for the foregoing reasons.

Wideman, Caldwell, Pacetti & Robinson, Manley P. Caldwell, Madison F. Pacetti, Attorneys for aforesaid defendants.

William H. Foulk, Of Counsel for aforesaid defendants.

Duly sworn to by Elizabeth Donner Hanson, jurat omitted in printing.

[fol. 50] In Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida

Decree Pro Confesso—March 4, 1954

The Plaintiff, having filed a Praecipe directing the Clerk to enter a Decree Pro Confesso against the defendant,

It Is Therefore Ordered that said bill be and is hereby taken as confessed by the defendant as follows:

Wilmington Trust Co., a Delaware Corporation; Louisville Trust Co., a Kentucky corporation; Delaware Trust Co., a Delaware corporation; Bryn-Mawr Hospital, a Pennsylvania corporation; The Donner Corporation, a Pennsylvania corporation; Benedict H. Hanson; John Stewart; Dora Browning Stewart Lewis; Mary Washington Stewart Borie; Miriam V. Moyer; James Smith and Dora Donner Ide.

Done and Ordered at the Clerk's office, City of West Palm Beach, Florida, this 4th day of March, 1954.

J. Alex Arnette, Clerk Circuit Court, By Thaddie P. Plant, Deputy Clerk.

[fol. 51] In Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida

Order Appointing Guardian Ad Litem—March 8, 1954

This cause coming on this day to be heard before me on plaintiffs' motion for the appointment of a guardian ad litem for the minor defendants, Paula Browning Denckla and William Donner Denckla, and it appearing to the Court that due service of process by publication has been made on said minor defendants as required by law, and said minor defendants having failed to answer or otherwise respond as required by law on or before the return day specified in the notice to appear, to-wit: February 25, 1954; and the Court being otherwise fully advised in the premises, it is thereupon,

Ordered, Adjudged and Decreed that Wilbur C. Cook, Esq., an attorney practicing before the Bar of this Court, be and he is hereby appointed as guardian ad litem for Paula Browning Denckla and William Donner Denckla, minor defendants in this cause, and the said guardian ad litem is hereby required to file an answer or make such defense as he may deem necessary or proper to protect the substantial interests, if any, of the said minor defendants.

Done and Ordered at West Palm Beach, Florida, this 8 day of March, 1954.

C. E. Chillingworth, Circuit Judge.

[fol. 52] IN CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

ORDER—April 9, 1954

This cause was duly presented by counsel for the parties.

Though this suit is primarily concerned with the validity and effect of certain powers of appointment, rather than the Will, I am inclined to think that the matters sought to be presented by the motion filed February 18, 1954 can best be determined at final hearing.

Thereupon, It Is Ordered that ruling upon the motion of Elizabeth Donner Hanson, etc., filed February 18, 1954, be postponed until trial and final hearing, with leave to said defendants to further plead within 15 days from date.

Copy furnished counsel.

Done and Ordered, this April 9, A. D. 1954.

C. E. Chillingworth, Circuit Judge.

[fol. 53] IN THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA

IN CHANCERY, No. 31,980

[Title omitted]

OFFICIAL COURT REPORTER'S TRANSCRIPT OF PROCEEDINGS BEFORE THE COURT—April 6, 1954

[fol. 54] APPEARANCES:

Messrs. Burns, Middleton & Rogers, Harvey Building, West Palm Beach, Florida, and Messrs. Redfearn & Ferrell, 550 Brickell Avenue, Miami, Florida, Attorneys for Plaintiffs, by Hon. C. Robert Burns, Hon. John M. Farrell, and Hon. D. H. Redfearn.

Messrs. Wideman, Caldwell, Pacetti & Robinson, Harvey Building, West Palm Beach, Florida, and Hon. William H. Foulk, Wilmington, Delaware, attorneys for Defendants Elizabeth Donner Hanson, individually as Executrix of the will of Dora Browning Donner, deceased, and as Guard-
[fol. 55] ian ad Litem for Donner Hanson and Joseph Donner Winsor; and William Donner Roosevelt, individually, by Hon. Manley P. Caldwell, Hon. Madison F. Pacetti, and Hon. William Foulk.

Hon. Wilbur E. Cook, Harvey Building, West Palm Beach, Florida, Guardian ad Litem for defendants Paula Browning Denckla, and William Donner Denckla.

Be It Remembered, that the following proceedings were had in the above numbered and entitled cause, on its merits, before Honorable C. E. Chillingworth, one of the Judges of the above styled Court, in Chambers, in the County Court House, in the City of West Palm Beach, in said State and County, on Tuesday, the sixth day of April, A. D. 1954, at the hour of 10:00 o'clock a. m.

There were present, at said time and place, among others, the attorneys above enumerated.

Thereupon, the following proceedings were had, to wit:

The Court: All right.

Mr. Caldwell: It is our motion which is called up for argument, so——

Mr. Redfearn: Before the argument begins, I think there should be an announcement of representation here. Mr. C. Robert Burns and D. H. Redfearn represent the plaintiffs. I would like to have an announcement as to who represents the defendants.

Mr. Caldwell: Defendants are represented by our firm, Wideman, Caldwell, Pacetti & Robinson, by myself, Manley
[fol. 56] P. Caldwell and Madison F. Pacetti, and William H. Foulk of Wilmington, Delaware. And, I believe, Wilbur Cook is Guardian ad Litem for certain defendants.

The Court: Do you represent all the defendants, or some of them?

Mr. Caldwell: We represent some of them. We represent the defendant Hanson as Executrix and as Guardian ad Litem for two children, Donner Hanson and Joseph Donner

Winsor, and also William Roosevelt. Those, I might say, are the only defendants in our group that have entered any appearance or any pleadings in the case.

The Court: All right.

Mr. Redfearn: We would like for the record also to show whether or not Mr. Foulk, whom Your Honor is recognizing as a member of the Florida Bar for this particular case, is a director in the Delaware Trust Company, and whether or not he is a member of the Trust Committee of that institution, and whether or not he is general counsel for it, or is associate counsel.

Mr. Foulk: I am a director, and I am a member of the Trust Committee. I am not general counsel, and I do not represent the bank.

Mr. Redfearn: You do not represent the bank?

Mr. Foulk: No. Berl, Potter & Anderson are general [fol. 57] counsel for the bank.

Mr. Redfearn: But you are a director of the Delaware Trust Company?

Mr. Foulk: That's right.

Mr. Redfearn: And you are a member of the Trust Committee?

Mr. Foulk: That's right.

Mr. Caldwell: Is there anything further, Mr. Redfearn?

Mr. Redfearn: The question with reference to Mr. Foulk's right to represent the defendants in this case arises as a result of his announcement. Mr. Foulk is a director of the Delaware Trust Company and he is a member of the Trust Committee. The Delaware Trust Company is Trustee for the two grandchildren named by Mr. Caldwell. It is also Trustee for our clients. There is a conflicting interest there. The Delaware Trust Company cannot have its director and Trust Committee member here representing one group of beneficiaries when it is its duty to stand impartially between the litigants and to tell this Court that it will take the trust funds received and administer them for the benefit of whatever beneficiary appears to be entitled to the same as a result of the order of this Court.

Now, for its member of the Board of Directors and its [fol. 58] member of the Trust Committee to come here to take sides in the case on behalf of one group of beneficiaries against another is contrary to the canons of ethics of the

Florida State Bar, and when Mr. Foulks asked for the privilege of practicing law in Florida in this particular case he automatically becomes subject to our canons of ethics, which require, under Rule 1, that an attorney represent his client with undivided loyalty. Mr. Foulks cannot represent his client, Delaware Trust Company, or these beneficiaries, with undivided loyalty when it is a contest between two sets of beneficiaries with the Delaware Trust Company trustee for both.

Whoever wins this case, the Delaware Trust Company will take over for that set of beneficiaries. Mr. Foulk can't get on his legal horse and ride off in two directions in this case and expect this Court to hear him.

Mr. Caldwell: Do you want to reply to that?

Mr. Foulks: If Your Honor has any question about it—I am not here representing the Delaware Trust Company. I am here representing the executrix, and I have so appeared in the proceedings before the County Judge. I hadn't considered that I was creating any conflict, because [fol. 59] the Delaware Trust Company has not appeared in this case, and I have no authority to appear for them or to act for them in this proceedings, but if Your Honor has any——

The Court: I am not sufficiently familiar with this case to pass upon that. I will recognize you as amicus curiae and will be glad to have your views, or anybody else's interested in the case.

Mr. Redfearn: He made another admission that needs to be noted in the record. He says he represents the executrix. The executrix is a trustee, and it is the duty of the executrix to stand impartially between these two sets of beneficiaries. Now, he is representing the executrix, who has to represent these beneficiaries impartially. He says he is not counsel for the Delaware Trust Company, and they have not been served, according to him, in this case, but he is a member of their Board of Directors and their Trust Committee, and he is here trying to make one set of beneficiaries prevail over another in this case, and we wish the record to show that.

Mr. Caldwell: It is the duty of the executrix to do what she considers best for upholding the intentions of the testa-

tor and fulfilling her trust. If she considers that the intentions of the testator are——

[fol. 60] The Court: I will be glad to hear Mr. Caldwell on the motion. I don't know enough about this to pass upon the propriety of the situation. What motions do you have? Let's get down to business.

Mr. Burns: It is their motion, if Your Honor please.

The Court: All right.

Mr. Caldwell: If you are through with the preliminaries——

The Court: You needn't take this. This is just argument.

Mr. Caldwell: I don't think this has to be reported.

Mr. Redfearn: We would like to have the statements in the record as to representation.

The Court: Yes, but the argument doesn't need to be reported.

(Reporter excused.)

[fol. 61] Reporter's certificate to foregoing transcript omitted in printing.

[fol. 62] IN SUPREME COURT OF STATE OF FLORIDA

ORDER DENYING PETITION FOR WRIT OF CERTIORARI—
Filed July 1, 1954

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the Circuit Court for Palm Beach County in said cause bearing date April 9th, 1954, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A True Copy

Test:
Guyte P. McCord, Clerk Supreme Court

(Seal of Supreme Court of
the State of Florida)

[fol. 63] IN CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

ANSWER OF ELIZABETH DONNER HANSON, ETC., ET AL.—Filed August 3, 1954

Come now the defendants, Elizabeth Donner Hanson, individually, as Executrix of the will of Dora Browning Donner, Deceased and as guardian ad litem for Donner Hanson and Joseph Donner Winsor, and William Donner Roosevelt, individually, by their undersigned attorneys, and for their joint and several answer to the bill of complaint herein allege:

1.

These defendants admit the allegations of Paragraph 1 of the bill of complaint concerning the corporate status of Wilmington Trust Company, Louisville Trust Company, Delaware Trust Company, Bryn-Mawr Hospital and The Donner Corporation. They admit that said corporations are not qualified to do business in the State of Florida and that none of the officers, directors, general managers, cashiers, resident agents and business agents of said corporations can be found within the State of Florida.

These defendants admit the allegations of the first paragraph of the bill of complaint concerning the residences and ages of the non-corporate defendants herein, except they deny that the defendant, Walter Hamilton, is a resident of Palm Beach County, Florida, his residence being Rosemont, Pennsylvania.

2.

Answering Paragraph 2 of the bill, these defendants admit that Dora Browning Donner was a resident of Pennsylvania on March 25, 1935 and that she was a resident of Florida subsequent to January 15, 1944, until her death on November 20, 1952. They admit the allegations in said [fol. 64] paragraph concerning her last will and testament and the payment of intangible property taxes.

3.

These defendants admit the allegations of Paragraph 3 of the bill of complaint.

4.

These defendants admit the allegations of Paragraph 4 of the bill, but aver that the facts therein alleged are not material because the exercise of the power of appointment therein described was superseded and revoked by a subsequent exercise of said power of appointment.

5.

These defendants admit the allegations of Paragraph 5 of the bill, but aver that the facts therein alleged are not material because the exercise of the power of appointment therein described was superseded and revoked by a subsequent exercise of said power of appointment.

6.

These defendants admit the allegations of Paragraph 6 of the bill.

7.

These defendants admit the allegations of Paragraph 7 of the bill.

8.

Answering Paragraph 8 of the bill, these defendants deny that any decree which should be entered in this suit would bind the defendants, Elizabeth Donner Hanson as Executrix of said Estate, or individually, or Dora Donner Ide or The Donner Corporation, because this Court lacks jurisdic- [fol. 65] tion of the subject matter of this suit and of indispensable parties hereto for the reasons hereinafter alleged in Paragraph 10 of this answer.

Further answering Paragraph 8 of the bill, these defendants admit that in the exercise of the power of appointment dated April 6, 1935, the Trustor provided $10,000 for each grandchild of the Trustor born after April 6, 1935. They deny that all grandchildren born to said Trustor after

said date have been made parties defendant to this cause and assert that Trustor's grandson, Curtin Winsor, Jr., was born after said date. However, these defendants allege this omission is immaterial because said exercise of power of appointment was superseded and revoked by a subsequent exercise of such power of appointment.

Answering the last sub-paragraph of Paragraph 8 of the will, these defendants admit the allegations therein as to the provisions for servants of the Trustor, but allege that Ruth Brenner, Dorothy Doyle and Mary Glackens were qualified to receive and did receive, and have been paid, $1,000.00 each in accordance with said provisions of said exercise of power of appointment.

9.

Although these defendants are advised that the allegations of Paragraph 9 of the bill are so argumentative and replete with conclusions of law as not to require answer, in order that their position may be clear to the Court, Paragraph 9 is answered as follows:

These defendants allege that the only questions and doubts that have arisen concerning the property passing under the residuary clause of said will are those raised by the plaintiffs in this suit. Since the Decedent during her [fol. 56] lifetime did effectively and validly exercise powers of appointment under the Trust Agreement described in the bill, only the portion of the property in such Trust, which was not disposed of by said exercise of powers of appointment, passed under the residuary clause of said will. The rest of the property in said Trust passed to and has been delivered to the recipients under the appointment dated December 3, 1949, as amended July 7, 1950, to-wit, to Delaware Trust Company as Trustee for the benefit of Joseph Donner Winsor, and as Trustee for the benefit of Donner Hanson and to the individual recipients named in said appointment. Said trusts were not created by Dora Browning Donner, but were created prior to December 3, 1949, by Elizabeth Donner Hanson.

These defendants deny that any of the exercises of powers described in the bill is testamentary in character

and deny that each provides that it is not to take effect until after the death of said settlor. Since none of the said exercises are testamentary in character, none of these is required to be executed in the manner required by the applicable law for testamentary disposition.

These defendants further allege that even if any of said exercises was testamentary in character or form, each of them was executed in the manner required by the applicable law for testamentary dispositions. Each of said exercises was signed by the Decedent in the presence of two attesting witnesses present at the same time. In addition to the subscribing witness on each exercise, there was on the occasion of each execution at least one additional individual present at the same time the instrument was signed by the Decedent, as a second attesting witness thereto.

These defendants further allege that even if the exercise [fol: 67] dated December 3, 1949, as amended July 7, 1950, is testamentary in character and lacks proper testamentary execution, the same was ratified and confirmed by and through the last will and testament of the Decedent, which was executed in proper testamentary form.

These defendants further aver that the only questions which have been raised as to which is the proper law to be applied with reference to said exercises of powers of appointment, have been raised by the plaintiffs in this suit. It is clear that the law that controls as to such exercises is the law of the State of Delaware, where the Trusts have their situs, where the Trustees have their places of business and where the assets of said Trusts were and are located, while the law which controls as to whether the execution of said exercises was in proper testamentary form, if such was required, is the law of the State of Florida, of which Decedent was a resident at the time of her death.

These defendants deny that there are any assets of the residuary estate of the Decedent which must be "captured" for the benefit of the Estate prior to the discharge of the Defendant Executrix, or at any time. Said Defendant Executrix conceives that it is her duty to uphold the obvious and unambiguously expressed intent of the Decedent that provision be made for her grandchildren and the other persons named in the exercise of December 3, 1949, as

amended on July 7, 1950, and that the plaintiffs herein should receive only the remainder of the trust property. Therefore, it is admitted that she takes the position that the exercise of December 3, 1949, as amended, is valid and fully effective, and she has proceeded accordingly in the administration of said Estate.

Wherefore These Defendants Pray that the exercise of [fol. 68] December 3, 1949, as amended on July 7, 1950, be declared and decreed to be valid and effective, and that it be declared that only such portion of the trust property which was not disposed of by said exercise, as amended, passed into the residuary estate of the Decedent and thence to the plaintiffs, and that the plaintiffs are not entitled to any other portion of said trust property.

10.

Further answering said bill of complaint and for defences on jurisdictional grounds, these defendants aver that this Court lacks jurisdiction over the subject matter in this suit for the following reasons.

Defendants, Wilmington Trust Company and Delaware Trust Company, are corporations organized and operating as trust companies under the laws of the State of Delaware at Wilmington, Delaware. The Donner Corporation is a corporation organized and operating under the laws of the State of Pennsylvania at Philadelphia, Pennsylvania. None of said corporations have any place of business in the State of Florida; nor are any of them transacting any business in this State; nor do any of them have any officers or agents in this State; nor have any of them been served with process in this State.

There is no res in this state which would constitute a legal basis for constructive service upon any of them. The assets, which constitute the subject matter of this suit, are situated in the State of Delaware and no part thereof are or have ever been physically or constructively situated or located in this State.

Long prior to the institution of this suit Wilmington Trust Company paid over and distributed to Delaware [fol. 69] Trust Company, as Trustee, the assets of the

trusts for the benefit of Joseph Donner Winsor and Donner Hanson described in the bill of complaint and paid over and distributed to Bryn-Mawr Hospital and the individual donees the cash given to them by the Decedent, alleged in said bill of complaint. All of the assets of said trusts for the benefit of Joseph Donner Winsor and Donner Hanson are in the possession, custody and control of Delaware Trust Company in Wilmington, Delaware. Elizabeth Donner Hanson, as Executrix of the Decedent's Estate, does not have and has never had any possession, custody or control of any portion of aforesaid trust assets or cash gifts.

Said defendants, Wilmington Trust Company and Delaware Trust Company, have declined to appear herein or to submit themselves to the jurisdiction of this Court in any manner.

This Court cannot enter a decree which would be valid and enforceable as to the assets of said Trust, or which would be entitled to full faith and credit under the Constitution of the United States. The exercise by this Court of the jurisdiction sought to be invoked by the plaintiffs herein would contravene the Constitution and Laws of the State of Florida and the Constitution of the United States and in particular, Section 1 of the Fourteenth Amendment to the United States Constitution.

The Court lacks jurisdiction over the person of aforesaid indispensable parties, for the foregoing reasons.

The purported process herein directed to said indispensable parties is insufficient, for the foregoing reasons.

The purported service of process upon said indispensable parties is insufficient, for the foregoing reasons.

The plaintiffs have failed to join said indispensable parties by valid and legal process, for the foregoing reasons.

[fol. 70] Wherefore, These Defendants Pray that this suit be dismissed for lack of jurisdiction of this Court.

11.

Further answering said bill of complaint, these defendants aver that Elizabeth Donner Hanson, as Executrix and Trustee under the last will and testament of Dora Brown-

ing Donner, Deceased, intending to meet plaintiffs' charge that she has failed to take steps to "capture" assets belonging to said Estate, and in order to expedite the final determination of the controversy raised by plaintiffs, on the 28th day of July, 1954, filed in the Court of Chancery of the State of Delaware in and for New Castle County, a complaint for declaratory judgment against Wilmington Trust Company as Trustee, Delaware Trust Company as Trustee, the plaintiffs in this suit and others, as defendants, asking the Court to determine the persons entitled to participate in the assets held in trust by Wilmington Trust Company under aforesaid trust agreement, and seeking other appropriate relief. Copy of said complaint is hereto attached and made a part of this answer.

Said Court of Chancery of the State of Delaware in and for New Castle County, the county in which Wilmington Trust Company and Delaware Trust Company are situated, is the only Court (1) having jurisdiction of aforesaid trust, the Trustees and the trust assets; (2) which can appropriately and finally determine the validity of said exercise of powers of appointment and (3) whose decree would be entitled to full faith and credit under the Constitution of the United States.

Continuance of the suit in this Florida Court would be oppressive, invalid, ineffective and unnecessary in view of the pendency of said Delaware suit, in which the plaintiffs [fol. 71] herein, and the other interested parties, can obtain appropriate and final determination and adjudication of their rights by a valid and enforceable judgment.

Wherefore, These Defendants Pray that this Florida suit be stayed pending determination of said Delaware suit, and that this suit be dismissed upon the final determination of such Delaware suit.

Wideman, Caldwell, Pacetti & Robinson, Manley P. Caldwell, Madison F. Pacetti, Attorneys for aforesaid Defendants.

William H. Foulk, Of Counsel for aforesaid Defendants.

Certificate of Service (omitted in printing).

[fol. 72] ATTACHMENT TO ANSWER

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ELIZABETH DONNER HANSON, as Executrix and Trustee under the last will of Dora Browning Donner, deceased,
Plaintiff,

v.

WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee under three separate agreements (1) and (2) with William H. Donner dated March 18, 1932 and March 19, 1932, and (3) with Dora Browning Donner dated March 25, 1935;

DELAWARE TRUST COMPANY, a Delaware corporation, as Trustee under three separate agreements, (1) with William H. Donner dated August 6, 1940, and (2) and (3) with Elizabeth Donner Hanson, both dated November 26, 1948;

KATHERINE N. R. DENCKLA;

ELWYN L. MIDDLETON, Guardian of the property of Dorothy B. R. Stewart, a mentally ill person;

JOSEPH DONNER WINSOR; DONNER HANSON;

BRYN MAWR HOSPITAL, a Pennsylvania corporation; MIRIAM V. MOYER; JAMES SMITH; WALTER HAMILTON; DOROTHY A. DOYLE; RUTH BRENNER; MARY GLACKENS;

LOUISVILLE TRUST COMPANY a Kentucky corporation, as Trustee for Benedict H. Hanson, and as Trustee Under agreements with William H. Donner;

DORA STEWART LEWIS; MARY WASHINGTON STEWART BORIE; PAULA BROWNING DENCKLA; WILLIAM DONNER DENCKLA; WILLIAM DONNER ROOSEVELT; CURTIN WINSOR, JR.; JOHN STEWART; and BENEDICT H. HANSON;

Defendants.

[fol. 73] 1. Elizabeth Donner Hanson, the plaintiff, is Executrix of and Trustee under the will, dated December 3, 1949, of her mother, Dora Browning Donner, who died November 20, 1952 (a copy of said will is attached hereto, marked Exhibit A and made a part hereof). She was appointed Executrix by the County Judges' Court in and for Palm Beach County, Florida, on December 23, 1952, and duly qualified thereafter.

2. Wilmington Trust Company is a Delaware corporation engaged in banking, with principal offices at Tenth and Market Streets, Wilmington, Delaware. It is Trustee under three separate agreements: (1) and (2) with William H. Donner dated March 18, 1932 and March 19, 1932, and (3) with Dora Browning Donner dated March 25, 1935, designated Trust #2152 (a copy of said agreement is attached hereto, marked Exhibit ~~B and~~ made a part hereof).

3. Delaware Trust Company is a Delaware corporation engaged in banking, with principal offices at 900 Market Street, Wilmington, Delaware. It is Trustee under three separate agreements: (1) with William H. Donner dated August 6, 1940 for the benefit of Katherine N. R. Denckla, designated Trust #8555; and (2) and (3) with Elizabeth Donner Hanson each dated November 26, 1948, for the benefit of Joseph Donner Winsor and Donner Hanson, designated Trusts #9022 and #9023 respectively.

4. Katherine N. R. Denckla (sometimes known as Katherine N. R. Denckla Ordway), beneficiary under Trust designated #8555, resides at Hobe Sound, Florida.

5. Elwyn L. Middleton, residing at Harvey Building, West Palm Beach, Florida, was duly appointed guardian for Dorothy B. R. Stewart, a mentally ill person, by the County Judges' Court in and for Palm Beach County, [fol. 74] Florida, on December 22, 1952. Dorothy B. R. Stewart is the beneficiary for life of a testamentary trust created by Paragraph Fifth (b) of the will of the said Dora Browning Donner; the plaintiff is designated as Trustee thereof to pay income to Dorothy B. R. Stewart as directed by Katherine N. R. Denckla.

6. Joseph Donner Winsor and Donner Hanson, beneficiaries under Trusts designated #9022 and #9023, respectively, as hereinbefore set forth in Paragraph 3, are minors, residing with their mother, Elizabeth Donner Hanson, at 2540 South Ocean Boulevard, Palm Beach, Florida.

7. The following defendants, all of whom are non-residents of the State of Delaware, were appointed under a power of appointment dated October 3, 1949 (a copy of which is attached hereto, marked Exhibit C and made a part hereof), exercised by Dora Browning Donner under trust dated March 25, 1935, designated Trust #2152, and, with the exception of Louisville Trust Company, Trustee for Benedict H. Hanson, which appointment was later revoked by appointment dated July 7, 1950 (a copy of which is attached hereto, marked Exhibit D and made a part hereof), have received the amounts appointed to them:

Bryn Mawr Hospital Bryn Mawr, Pa.		$10,000.
Miriam V. Moyer 1710 Fidelity-Philadelphia Bldg. Philadelphia, Pa.		2,000.
James Smith 221 Williams St. Rosemont, Pa.		1,000.
Walter Hamilton Rosemont, Pa.		1,000.
[fol. 75] Dorothy A. Doyle 5108 Penn St. Philadelphia 24, Pa.		1,000.
Ruth Brenner 4224 Osage Avenue Philadelphia 4, Pa.	Servants in employment for more than two years at time of Dora Browning Donner's death.	1,000.
Mary Glackens 4930 Westminster Ave. Philadelphia 31, Pa.		1,000.

Louisville Trust Company 10,000.
Louisville, Ky.
Trustee for Benedict H.
Hanson, 510 Park Ave.,
New York City, New York.

8. The following defendants, all of whom are non-residents of the State of Delaware, were appointed under two powers of appointment dated April 6, 1935 (a copy of which is attached hereto, marked Exhibit E and made a part hereof), and October 11, 1939 (a copy of which is attached hereto, marked Exhibit F and made a part hereof), exercised by Dora Browning Donner under trust dated March 25, 1935, designated Trust #2152; all of said appointments were revoked by the terms of the said power of appointment dated December 3, 1949 (Exhibit C hereto), but the parties are joined so as to permit adjudication of any right which they may have under said trust:

(a) Louisville Trust Company, Louisville, Kentucky, Trustee under certain agreements with William H. Donner, by a power of appointment dated April 6, 1935, for the following persons in the amount of $10,000 each:

[fol. 76] Dora Stewart Lewis (Dora Browning Stewart)
7000 Glendale Ave.
Chevy Chase, Maryland

Mary Washington Stewart Borie (Mary Washington Stewart)
6912 Madisonville Rd.
Maremont, Cincinnati, Ohio

Paula Browning Denckla
Grubbs Mill Road
Berwyn, Pa.

William Donner Denckla
5 East 67th Street
New York, N. Y.

William Donner Roosevelt
2540 South Ocean Blvd.
Palm Beach, Florida

(b) Wilmington Trust Company, Wilmington, Delaware, in further trust under Trust #2152 by a power of appointment dated April 6, 1935, for afterborn grandchildren, who are as follows, in the amount of $10,000 each:

Curtin Winsor, Jr.
2540 South Ocean Blvd.
Palm Beach, Florida

Joseph Donner Winsor
2540 South Ocean Blvd.
Palm Beach, Florida

Donner Hanson
2540 South Ocean Blvd.
Palm Beach, Florida

[fol. 77] (c) Wilmington Trust Company, Wilmington, Delaware, Trustee under certain agreements with William H. Donner dated March 18, 1932, and March 19, 1932, for the benefit of Katherine N. R. Denckla and Dorothy B. R. Stewart, respectively, by a power of appointment dated April 6, 1935, each to receive one-half of the residue of said trust.

(d) John Stewart, of Beechwood Road, Rosemont, Pa., beneficiary in the amount of $10,000 by a power of appointment dated April 6, 1935, and increased to $15,000 by a power of appointment dated October 11, 1939.

9. Dora Browning Donner, while residing at Villanova, Pennsylvania, entered into the said trust agreement dated March 25, 1935, designated Trust #2152, with Wilmington Trust Company (Exhibit B hereto) whereby she provided as follows:

> "Trustee shall pay over the net income of the trust fund unto Trustor, for and during the term of her natural life. Upon the death of Trustor trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the

last instrument in writing which she shall have executed and delivered to Trustee, or failing such instrument, by her last Will and Testament, or in default of any such appointment then unto the then living issue of Trustor, per stirpes and not per capita."

This trust was accepted by Wilmington Trust Company at its principal offices in Wilmington, Delaware, at which place the principal securities listed in Schedule A of the agreement were delivered to it. Said Trustee has continued to administer the trust in accordance with the terms thereof since the date of its creation and has retained possession of the corpus of said trust in Delaware except as hereinafter set forth in Paragraph 15.

[fol. 78] 10. After the creation of said trust, Dora Browning Donner exercised her reserved power of appointment under date of April 6, 1935, by appointing $5,000 to Bryn Mawr Hospital, $10,000 to John Stewart, $10,000 to each of her grandchildren, who are the persons hereinbefore set forth in Paragraphs 8 (a) and (b), and the balance to Wilmington Trust Company, in trust, one-half for the benefit of Katherine N. R. Denckla (named in the will of the said Dora Browning Donner as Katherine N. R. Denckla Ordway) and the other half for the benefit of the defendant, Dorothy B. R. Stewart, as hereinbefore set forth in Paragraph 8 (c).

11. Dora Browning Donner amended said appointment of April 6, 1935, by a further appointment dated October 11, 1939, which increased the amount appointed to John Stewart from $10,000 to $15,000, as hereinbefore set forth in Paragraph 8 (d), and appointed $1,000 to James Smith.

12. By the terms of a power of appointment dated December 3, 1949 (Exhibit C hereto), Dora Browning Donner revoked all appointments made by her previous to that date, especially the appointment dated April 6, 1935, as altered, amended and modified by the appointment dated October 11, 1939, and appointed $2,000 to Miriam V. Moyer; $1,000 each to James Smith, Walter Hamilton, Dorothy A. Doyle, Ruth Brenner, and Mary Glackens; $10,000 to Louisville Trust Company in trust for Benedict H. Hanson for life

with remainder to Delaware Trust Company, Trustee under Trust #9023 for the benefit of Donner Hanson; $10,000 to Bryn Mawr Hospital; and $200,000 each to Delaware Trust Company as Trustee of Trusts #9022 for the benefit of Joseph Donner Winsor and #9023 for Donner Hanson, respectively; and the residue to the Executrix of her will, to be dealt with in accordance with the terms and conditions thereof.

[fol. 79] 13. The will of Dora Browning Donner dated December 3, 1949 (Paragraph Fifth of Exhibit A hereto) directs that her residuary estate be divided into two equal parts to be held as follows:

(a) One part to Delaware Trust Company, Trustee under an agreement with William H. Donner dated August 6, 1940 for the benefit of Katherine N. R. Denckla, designated Trust #8555.

(b) One part to the plaintiff, Elizabeth Donner Hanson, in trust, for the payment of so much of the income and/or principal therefrom for the support and maintenance, benefit and/or comfort of Dorothy B. R. Stewart (whose guardian, Elwyn L. Middleton, is a defendant herein), in such amounts and at such times and in such manner as Katherine N. R. Denckla Ordway, defendant herein, shall direct; upon the death of the said Dorothy B. R. Stewart the remainder is to be paid over to Delaware Trust Company, Trustee under an agreement with William H. Donner dated August 6, 1940 for the benefit of the said Katherine N. R. Denckla, designated Trust #8555.

14. By the terms of an appointment dated July 7, 1950 (Exhibit D hereto), Dora Browning Donner revoked and eliminated the appointment of December 3, 1949, of $10,000 to Louisville Trust Company as Trustee for the benefit of Benedict H. Hanson.

15. Subsequent to the death of Dora Browning Donner, Wilmington Trust Company, Trustee of said Trust #2152, pursuant to the provisions thereof and in accordance with [fol. 80] the terms of Paragraph (b) of the appointment

dated December 3, 1949, "to make all the payments * * * directed to be made in cash or in kind or partly in cash and partly in kind; to withhold in whole or in part any payments directed to be made until the expiration of six months but not later than twelve months after * * * death," on January 7, 1953, paid to the individual appointees and to Bryn Mawr Hospital the amounts appointed to them, aggregating $17,000, and on April 17, 1953, delivered to Delaware Trust Company, Trustee under Trusts #9022 and #9023, securities and cash in the aggregate amount of $400,000. Wilmington Trust Company continues to hold the remaining assets in said trust for the account of the plaintiff as Executrix and Trustee of the will of Dora Browning Donner.

16. On January 22, 1954, Katherine N. R. Denckla and Elwyn L. Middleton, as guardian of the property of Dorothy B. R. Stewart, without having theretofore served any notice or made any demand on the plaintiff or Wilmington Trust Company as Trustee, filed suit against the plaintiff and the other defendants herein in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, being No. 31,980 in Chancery, asking for a declaratory decree determining the validity of the powers of appointment made by the said Dora Browning Donner under the provisions of her Trust dated March 25, 1935.

17. No valid service of process has been made upon either Wilmington Trust Company or Delaware Trust Company as Trustees in said suit, and said Trustees have not appeared therein. No part of the assets held by Wilmington Trust Company, as Trustee of Trust #2152, and transferred to the appointees under the power of appointment dated December 5, 1949, including those now held by Delaware Trust Company, as Trustee of Trusts #9022 and [fol. 81] #9023, are now or have ever been in the State of Florida or under the jurisdiction of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida.

18. The plaintiff, being a resident of and having been served in the State of Florida, moved the court to dismiss the suit because indispensable parties were absent the juris-

diction and the court could not, therefore, render an effective and binding final decree. The Circuit Court reserved decision on this motion pending a trial on the merits, and the Supreme Court of Florida denied certiorari.

19. The complaint in the Florida suit charged that the present plaintiff as Executrix of the Estate of Dora Browning Donner "has failed to take any steps" to capture for the estate the property of the trust appointed as hereinbefore recited. In the argument on the motion to dismiss, the complainants in that suit represented to the court that the plaintiff herein is a "wealthy" person, and could be surcharged by the Florida court for her failure to recover the assets from the Wilmington Company, in the first instance, and presently from Delaware Trust Company, after which she could recover from said Trustees. The plaintiff desires to have the controversy hereinbefore set forth promptly and finally and conclusively determined as to all parties so that she may effectively perform all of her duties, account as Executrix and enter upon her duties as Trustee.

20. The plaintiff has no adequate remedy at law.

Wherefore, the plaintiff prays that:

(1) An appropriate summons be directed to the said defendants, and in the case of non-residents an appropriate Order for Substituted Service be entered requiring the appearance of the said defendants.

(2) This Court determine by declaratory judgment the [fol. 82] persons entitled to participate in the assets held in trust by the Wilmington Trust Company under Trust #2152 and the powers of appointment exercised pursuant thereto, at the date of death of Dora Browning Donner, and enter decrees awarding said funds to the persons entitled thereto.

(3) This Court grant such other and further relief as may be appropriate and necessary to effectuate its said judgment.

William H. Foulk, William Duffy, Jr., Attorneys for Plaintiff, 228 Delaware Trust Building, Wilmington, Delaware.

[fol. 83] IN CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

MOTION TO STAY—Filed August 3, 1954

Come now the defendants, Elizabeth Donner Hanson, individually, as Executrix of the will of Dora Browning Donner, Deceased and as guardian ad litem for Donner Hanson and Joseph Donner Winsor, and William Donner Roosevelt, individually, by their undersigned attorneys, and move the above styled Court to stay proceedings in this suit upon the following ground:

Elizabeth Donner Hanson, as Executrix and Trustee under the last will and testament of Dora Browning Donner, Deceased, intending to meet plaintiffs' charge herein that she has failed to take steps to "capture" assets belonging to said Estate, and in order to expedite the final determination of the controversy raised by plaintiffs, on the 28th day of July, 1954, filed in the Court of Chancery of the State of Delaware in and for New Castle County, a complaint for declaratory judgment against Wilmington Trust Company as Trustee, Delaware Trust Company as Trustee, the plaintiffs in this suit and others, as defendants, asking the Court to determine the persons entitled to participate in the assets held in trust by Wilmington Trust Company under aforesaid trust agreement, and seeking other appropriate relief. Copy of said complaint is attached to the answer of these defendants filed contemporaneously with this motion and is made a part of this motion by reference. [fol. 84] Said Court of Chancery of the State of Delaware in and for New Castle County, the county in which Wilmington Trust Company and Delaware Trust Company are situated, is the only Court (1) having jurisdiction of aforesaid Trust, the Trustees and the Trust assets; (2) which can appropriately and fully determine the validity of said exercises of powers of appointment and (3) whose decree would be entitled to full faith and credit under the Constitution of the United States; all of which more fully appears from Paragraph 10 of aforesaid answer of these defendants, which is made a part hereto by reference.

Continuance of the suit in this Florida Court would be oppressive, invalid, ineffective and unnecessary in view of the pendency of said Delaware suit, in which the plaintiffs herein, and the other interested parties, can obtain appropriate and final determination and adjudication of their rights by a valid and enforceable judgment.

Wherefore, These Defendants Move the Court that the proceedings herein be stayed pending determination of said Delaware suit.

Wideman, Caldwell, Pacetti & Robinson, Manley P. Caldwell, Madison F. Pacetti, Attorneys for aforesaid Defendants.

William H. Foulk, Of Counsel for aforesaid Defendants.

[fol. 85] In Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida

Application for Injunction and Other Relief—
Filed August 16, 1954

The plaintiffs herein respectfully show unto the Court as follows:

1.

A complaint for declaratory decree in this cause was filed on January 22, 1954, by the plaintiffs, each of whom is a citizen and resident of the State of Florida, seeking to determine what property passes to whom under the residuary clause of the will of Dora Browning Donner, deceased. The decedent was a resident of Palm Beach County, Florida, at the date of her death. Her will is presently under probate in Palm Beach County, Florida, and is being administered by a Florida citizen as executrix, to-wit: the defendant, Elizabeth Donner Hanson, who resides and has her home in Palm Beach County, Florida.

2.

The said defendant Elizabeth Donner Hanson, individually and as executrix of the last will and testament of Dora

Browning Donner, deceased, and as guardian ad litem for Donner Hanson, Joseph Donner Winsor and William Donner Roosevelt, other defendants herein, filed a motion to dismiss the complaint for declaratory decree on February 18, 1954, alleging therein that Wilmington Trust Company and Delaware Trust Company, as trustees, also defendants in such suit for declaratory decree, would not submit themselves to the jurisdiction of this Court, and that there is "no res in this state which would constitute a legal basis for constructive service upon any of them."

[fol. 86]

3.

The Honorable C. E. Chillingworth, one of the Judges of this Court, heard argument upon the aforesaid motion, and, on April 9, 1954, denied it; thereupon, the aforesaid Elizabeth Donner Hanson filed petition for certiorari in the Supreme Court of Florida seeking to have the order of Judge Chillingworth reviewed. The Supreme Court of Florida promptly denied such petition and the aforesaid defendants' petition for rehearing was also denied, and the mandate of the Supreme Court of Florida was filed in the office of the Clerk of this Circuit Court, on the 1st day of July, 1954.

4.

Thus, the issue as to jurisdiction raised by the defendant, Elizabeth Donner Hanson, has been adjudicated herein and is now the law of this case binding on all parties hereto. Decrees pro confesso herein have been duly and regularly entered against all defendants in this case except Elizabeth Donner Hanson, individually and as executrix, and except as against her children, the defendants Donner Hanson, Joseph Donner Winsor and William Donner Roosevelt, all of whom filed a joint answer in this case on August 3, 1954. Included among those defendants herein as against whom decrees pro confesso have been duly and regularly entered are the defendants Wilmington Trust Company and Delaware Trust Company, as trustees.

5.

Despite the foregoing adjudication of the Honorable Judge Chillingworth, the defendant Elizabeth Donner Han- [fol. 87] son, in her several capacities, in said answer, which she filed herein on the 3rd day of August, 1954, again raises the identical question of jurisdiction previously unsuccessfully raised, and the said answering defendants have also set up in such answer, as well as in a motion to stay filed herein on the 3rd day of August, 1954, the fact that said Elizabeth Donner Hanson did, on the 28th day of July, 1954 (being a date subsequent to the filing in this case of the mandate of the Supreme Court of Florida above referred to), cause to be filed a complaint for declaratory judgment wherein the said Elizabeth Donner Hanson, as executrix aforesaid and as trustee, was plaintiff, in the Court of Chancery of the State of Delaware in and for New Castle County, in which said complaint for declaratory judgment the defendants named include the plaintiffs in this Palm Beach County declaratory decree action as well as the remaining defendants in the latter action. A copy of such complaint for declaratory judgment in Delaware is attached to the aforesaid answer and is made a part hereof by reference. In such complaint the aforesaid Elizabeth Donner Hanson seeks to have the Delaware Court determine substantially the identical relief prayed for in this bill for declaratory decree now pending in the Circuit Court of Palm Beach County, Florida.

6.

Plaintiffs allege that steps have been taken in the Delaware complaint for declaratory judgment suit to perfect constructive service upon these plaintiffs and that the same is returnable on or before the 10th day of September, 1954. Plaintiffs allege that the filing by the defendant Elizabeth Donner Hanson of the aforesaid complaint for declaratory judgment in Delaware is a deliberate attempt to confuse the [fol. 88] issues in this litigation and to preclude this Honorable Court in Palm Beach County, Florida, from concluding properly the case now pending before it. As evidence of bad faith on the part of the aforesaid Elizabeth

Donner Hanson in filing such suit in Delaware, plaintiffs would respectfully show that if she can lose her case in Delaware and thus indirectly defeat this complaint for declaratory decree in Palm Beach County, Florida, approximately $417,000.00 in assets of the decedent will go to children of the aforesaid Elizabeth Donner Hanson rather than for the benefit of these plaintiffs as provided in the residuary clause of the will of the decedent. Plaintiffs further show that the said Elizabeth Donner Hanson is using as one of her attorneys in complaint for declaratory judgment in Delaware, one William H. Foulk, an attorney of Wilmington, Delaware, who is a director of Delaware Trust Company and one of its trust Committeemen. Plaintiffs allege that said Elizabeth Donner Hanson, as such plaintiff, is cooperating and collaborating with the Delaware Trust Company, one of the defendants, against the interest of plaintiffs in this case whom she represents, as such executrix, in a fiduciary capacity.

7.

Plaintiffs allege that the assets of the decedent, Dora Browning Donner, which are affected by any decision rendered in this declaratory decree suit in Palm Beach County, Florida, aggregate some $417,000.00 in intangible property; that despite allegations by the aforesaid Elizabeth Donner Hanson, contained in her answer as executrix herein, to the effect that such assets were paid over long prior to the institution of this suit by Wilmington Trust Company, as trustee, to Delaware Trust Company, as [fol. 89] trustees, and allegations that the same are not now or ever have been in the possession, custody or control of the said Elizabeth Donner Hanson, as executrix, the facts are, and the records of the probate court of Palm Beach County, Florida, show, that the said Elizabeth Donner Hanson, as executrix, listed such identical assets in her inventory and appraisement of the assets of the estate of Dora Browning Donner, deceased. Such records affirmatively also show that on December 23, 1953, the aforesaid Elizabeth Donner Hanson, as executrix, obtained an order from the County Judge of Palm Beach County, Florida,

allowing fees to her and to her attorneys, including the aforesaid William H. Foulk, based on the entire estate of the decedent, including the $417,000.00 worth of assets in question. Such fees were paid in December, 1953, prior to the institution of this bill for declaratory decree on January 22, 1954. After such bill had been filed and after these plaintiffs had petitioned the County Judge of Palm Beach County, Florida, to compel the aforesaid Elizabeth Donner Hanson, as executrix, to produce the assets of such estate, including those aforesaid, the said Elizabeth Donner Hanson, as executrix, filed a motion on February 26, 1954, in the County Judge's Court in Palm Beach County, Florida, offering to return approximately $7,600.00 in executrix's fees she had collected on the aforesaid $417,000.00 of assets, and her attorneys likewise offered to return to the estate approximately $5,700.00 of fees they had collected on the same assets under the order of December 23, 1953, above mentioned. The County Judge of Palm Beach County, Florida, on April 9, 1954, entered an order staying further hearing on such matters until the outcome of this case in Palm Beach County, Florida. Thus the executrix has contended in the County Judge's Court in Palm Beach County, Florida, that these assets are [fol. 90] part of the estate in Palm Beach County, Florida, and she and her attorneys have collected fees on the same, while now, in this litigation, by her answer aforesaid, she contends that these assets are not subject to the jurisdiction of the Florida Courts.

8.

Plaintiffs respectfully show, therefore, based upon the above facts, it affirmatively appears that the institution of the aforesaid litigation in New Castle County, Delaware, by the said Elizabeth Donner Hanson, as executrix, is a deliberate and contumacious act on the part of said person, and that to permit her, a resident and citizen of Palm Beach County, Florida, and the personal representative of the estate of a Palm Beach County resident which estate is now in probate in Palm Beach County, Florida, to continue the prosecution of such suit in Delaware under all the circumstances here present would, as to these plaintiffs, each of

whom also is a resident of Florida, be highly inequitable, unfair, and unjust; that the continuation of such suit in Delaware would interfere with the orderly, judicial processes of this Court, and would cause great vexation, hardship, and expense to these plaintiffs.

Wherefore, plaintiffs pray:

1. That this Court will enter an injunctive order immediately restraining and enjoining the said Elizabeth Donner Hanson, individually and as executrix and trustee under the last will and testament of Dora Browning Donner, deceased, from further proceeding and maintaining such complaint for declaratory judgment in New Castle County, Delaware.

2. That the plaintiffs have such other and further relief as to this Court may seem meet and proper.

C. Robert Burns, Redfearn & Ferrell, By: C. Robert Burns, Attorneys for Plaintiffs.

[fol. 91] *Duly sworn to by Elwyn L. Middleton, jurat omitted in printing.*

IN CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

REPLY TO APPLICATION FOR INJUNCTION—
Filed August 20, 1954

Come now the defendants, Elizabeth Donner Hanson, individually, as Executrix of the Last Will and Testament of Dora Browning Donner, Deceased and as guardian ad litem for defendants Joseph Donner Winsor and Donner Hanson, and William Donner Roosevelt, individually, by their undersigned attorneys, and for reply to the application for injunction heretofore filed herein by the plaintiffs, state:

[fol. 92] 1.

These defendants admit the allegations of Paragraph 1 of the application, except they aver that the purpose of

the complaint for declaratory decree filed by the plaintiffs is to determine the validity and effect of the exercise of certain powers of appointment by the decedent during her lifetime.

2.

These defendants admit the allegations of Paragraph 2 of the application.

3.

These defendants emphatically deny that the motion to dismiss on jurisdictional grounds filed by them on February 18, 1954, has ever been denied by this Court. They aver that in the order of this Court dated April 9, 1954 upon said motion, the Court held that this suit is primarily concerned with the validity and effect of certain powers of appointment rather than the will but that he was inclined to think that the matters sought to be presented by said motion can best be determined at final hearing. The Court then ordered that the ruling upon said motion be postponed until trial and final hearing. These defendants admit that they filed petition for certiorari in the Supreme Court of Florida, seeking to have said order reviewed, that the Supreme Court denied the petition and that petition for rehearing was also denied, but aver that said Supreme Court determination was not based upon the grounds of said jurisdictional question but merely sustained the postponement order. These defendants deny that mandate of the Supreme Court was filed in this Court on July 1, 1954, and deny that any mandate has ever been filed herein, although a certified copy of the order of the Supreme Court denying said petition has been filed herein.

[fol. 93]

4.

These defendants deny that the issue as to jurisdiction raised by these defendants has been adjudicated herein and deny that there is any law of the case on such jurisdictional point and deny that there has been any determination binding on all parties hereto.

These defendants admit the allegations of Paragraph 4 relating to the entry of decrees pro confesso and the filing

of answer herein, but deny that said decrees pro confesso were legally entered.

5.

These defendants admit that in their answer filed herein on August 3, 1954, they raised the same jurisdictional question raised in said motion to dismiss, but deny that they at any time unsuccessfully raised such point. They admit the allegations of Paragraph 5 as to the filing of complaint for declaratory judgment in the Court of Chancery of New Castle County, Delaware.

6.

These defendants admit that steps have been taken in the Delaware suit to perfect constructive service returnable September 10, 1954. They deny that the filing of said Delaware complaint is a deliberate attempt to confuse the issues in this litigation and to preclude this Court from concluding properly the case now pending before it. They deny that Elizabeth Donner Hanson is cooperating and collaborating with the Delaware Trust Company for any purpose. They aver that the reasons for the filing of said Delaware suit by Elizabeth Donner Hanson are the ones alleged and set forth in Paragraph 11 of her answer herein and in Paragraph 19 of the complaint in the Delaware suit, which paragraphs are made a part of this reply by reference.

[fol. 94]

7.

Answering Paragraph 7 of the application, these defendants aver that while the assets in issue herein were included in the original inventory and appraisement filed by Elizabeth Donner Hanson as Executrix, and the allowance of certain fees were based thereon, such inclusion was due to misunderstanding of the attorneys for said Executrix. The Executrix has sought to file in the County Judge's Court, Palm Beach County, amended inventory and appraisement correcting this mistake, but the filing thereof has been delayed by the opposition of the plaintiffs herein. Attached hereto and made a part hereof are certified copies of petition for permission to file such amended appraise-

ment and inventory with accompanying exhibits, and order of said County Judge's Court staying proceedings upon the motion of the plaintiffs herein to dismiss said petition, until the further order of said Court. The reasons for the erroneous inclusion of said disputed assets in the original inventory and appraisement appear from allegations of said petition and the exhibits attached thereto.

Accordingly, these defendants deny that the Executrix has contended in the County Judge's Court that said assets are a part of the Estate in this County.

8.

These defendants deny that the institution of the Delaware litigation is a deliberate and contumacious act on the part of Elizabeth Donner Hanson and deny that the continuance of the prosecution of such suit in Delaware would be inequitable, unfair or unjust. They deny that the continuance of such suit in Delaware would interfere with the orderly, judicial processes of this Court and they deny that it would cause vexation, hardship or unnecessary expense to the plaintiffs, but they aver that the Delaware [fol. 95] Court is the only proper Court for the determination of the involved issues for the reasons set forth in Paragraphs 10 and 11 of the answer of these defendants, which paragraphs are made a part hereof by reference.

Wherefore, these defendants pray that said application be denied and dismissed.

Wideman, Caldwell, Pacetti & Robinson, Manley P. Caldwell, Attorneys for aforesaid Defendants.

William H. Foulk, Of Counsel for aforesaid Defendants.

Duly sworn to by Manley P. Caldwell, jurat omitted in printing.

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ATTACHMENT TO REPLY, ETC.

IN THE COUNTY JUDGE'S COURT IN AND FOR
PALM BEACH COUNTY, FLORIDA

No. 10,394

IN RE:

ESTATE OF DORA BROWNING DONNER, Deceased.

PETITION

Comes now Elizabeth Donner Hanson, as Executrix of the above styled Estate, by her undersigned attorneys, and shows unto the Court as follows:

1. The Appraisement and Inventory filed herein on or about June 26, 1953 is inaccurate. It contains items which should not have been included therein and omits items which should have been included therein. The reasons for these incorrect inclusions and omissions appear from affidavits of William H. Foulk and Manley P. Caldwell, attorneys for said Executrix, which are hereto attached and made a part hereof.

2. Upon the discovery of these errors by these counsel on or about February 1, 1954, an Amended Appraisement and Inventory was prepared, which correctly sets forth the assets of this Estate, and it has been executed by the appraisers, Blaine Webb and Robert W. Hill, and by this Executrix. Copy thereof is hereto attached and made a part hereof. Petitioner desires to file herein said instrument upon obtaining permission of this Court so to do.

3. On December 23, 1953 this Court entered an order fixing and determining the fees of this Executrix and her attorneys for ordinary services and for extraordinary services to said date, in this Estate. That order was based upon the amount of the Estate stated in the original Appraisement and Inventory, and it appears from said Amended Appraisement and Inventory that the value of

the Estate is $382,845.11 less than the amount upon which such fees were based. An Amended order fixing the fees

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of the Executrix and her attorneys should be entered, reducing said fees in accordance with the correct value of the Estate. Petitioner and her attorneys are ready, willing and able to refund to the Estate such excess of the fees paid to them, upon the entry of said amended order.

Wherefore, Petitioner prays that permission be granted for the filing of such Amended Appraisement and Inventory in the place and stead of the original Appraisement and Inventory, and that amended order fixing the fees of the Executrix and her attorneys be entered, based upon the value of the Estate shown by the Amended Appraisement and Inventory.

Wideman, Caldwell, Pacetti & Robinson, Manley P. Caldwell, Madison F. Pacetti, 501 Harvey Building, West Palm Beach, Florida, Attorneys for aforesaid Executrix.

Wm. H. Foulk, 228 Delaware Trust Building, Wilmington, Delaware, Of counsel for aforesaid Executrix.

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AFFIDAVIT OF WILLIAM H. FOULK TO PETITION

STATE OF DELAWARE,
NEW CASTLE COUNTY, *ss.*:

William H. Foulk, being duly sworn according to law, deposes and says that he is an attorney at law with offices at 228 Delaware Trust Building, Wilmington, Delaware, and has been engaged in general practice for upwards of thirty years; that a substantial portion of his practice is in the field of trust, estate and tax matters, and that for more than five years he has been a member of the trust committee of Delaware Trust Company, Wilmington, Delaware; that in the aforegoing capacities he has represented

and been consulted with respect to trusts and estates in Delaware and its contiguous States, Pennsylvania, New Jersey and Maryland, for many years; that he has represented members of the family of William H. Donner for over twenty years and caused the incorporation of and has represented The Donner Corporation, investment adviser to the trusts created by or for members of the Donner family since its incorporation; that he represents and has advised Elizabeth Donner Hanson in all matters arising out of her appointment and qualification as Executrix of the Last Will and Testament of her mother, Dora Browning Donner, who died on November 20, 1952; that immediately after Mrs. Donner's death at the request of E. Harris Drew, Esq., the then guardian of the property of Dorothy B. Stewart, one of Mrs. Donner's daughters, he summarized the nature and extent of said estate as set forth in copy of letter sent to Mr. Drew dated November 28, 1952 (copy of which is attached hereto marked Exhibit A)[1]; that immediately after the qualification of the said Elizabeth

[fol. 99]

WILL
B 80 Page 75

Donner Hanson as Executrix of her mother's estate on December 23, 1952, deponent began the accumulation of the data necessary to complete the inventory and appraisement of the estate; that in the collection of said data and in accordance with his experience in Delaware and elsewhere, he was particularly interested in the tax incidences of the estate and the need to have all taxable property appraised for estate tax purposes; that in pursuance of his duties, he requested and received from Wilmington Trust Company, Wilmington, Delaware, Trustee of a revocable trust created by Mrs. Donner under date of March 25, 1935, designated as Trust No. 2152, a list of the securities in said trust as of the date of her death (copy of which is attached hereto marked Exhibit B), and delivered said list to the appraisers for valuation as of said date, together with other data; that deponent did not advise said appraisers with reference to the disposition of

[1] The same information was given to Katherine N. R. Denckla by letter dated November 27, 1952.

ultimate ownership of said property, and upon receiving their valuation included it with their valuation of other assets directly owned in the inventory and appraisement filed in the probate proceedings; that pursuant to said trust designated Trust No. 2152, the Trustee was authorized to make distribution in cash or in kind, and pursuant to said authority and the direction contained in a power of appointment executed and filed with it dated December 3, 1949, as amended July 7, 1950, the Trustee on or about April 17, 1953, delivered to Delaware Trust Company, Wilmington, Delaware, Trustee for two trusts created by Elizabeth Donner Hanson under date of November 26, 1948, for the benefit of her two sons, Joseph Donner Winsor, and Donner Hanson, designated as Trusts Nos. 9022 and 9023, respectively, the following securities and cash, each trust receiving one-half thereof:

[fol. 100]

800 shs.	Mountain States Power Co. Common	$10,800.00
660 shs.	Citizens' Utilities Co. Common	8,827.50
2000 shs.	New York, Chicago & St. L. Common	85,250.00
100 shs.	St. Joseph Lead Co. Common	3,956.25
2400 shs.	Savannah Electric & Power Co. Com.	102,000.00
1440 shs.	Deep Rock Oil Corporation, Common	66,060.00
100 shs.	Western N. Y. Water Co. 5% N.C. Pfd.	10,000.00
400 shs.	West Penn Electric Co., Common	14,100 00
200 shs.	Blockson Chemical Co., Common	5,025.00
800 shs.	Air Associates, Inc.	6,600.00
132 shs.	Cuno Engineering Co., Common	5,280.00
96 shs.	Cuno Engineering Co., Class A	6,720.00
2400 shs.	Connecticut Filter Corp., Common	2,400.00
200 shs.	Colorado Interstate Gas Co., Com.	6,050.00
144 shs.	Hillsboro Plantation Inc., Pref.	14,400.00
200 shs.	Hillsboro Plantation Inc., Common	8,400.00
6M Note	Hillsboro Plantation Inc.	6,000.00
28M Note	Hillsboro Plantation Inc.	28,000.00
10M	Debenture Hillsboro Plantation Inc.	10,000.00
Cash		131.24

that Delaware Trust Company, as such Trustee, has continued to hold and administer said securities and cash pursuant to the provisions of said trust; that Wilmington

Trust Company, Trustee as aforesaid, likewise pursuant to said power of appointment, as amended, on January 7, 1953, paid the following pecuniary gifts:

Miriam V. Moyer	$ 2,000.00
James Smith	1,000.00
Walter Hamilton	1,000.00
Dorothy Doyle	1,000.00
[fol. 101]	
Ruth Brenner	1,000.00
Mary Glackens	1,000.00
Bryn Mawr Hospital	10,000.00

that the inventory and appraisement filed herein, being premised on the tax requirements of the estate, did not segregate the assets held in the revocable trust designated as Trust No. 2152, as deponent is now advised and believes is required by the laws of the State of Florida; that said inventory and appraisement failed to include the cash in said Trust No. 2152, since it was not shown on Exhibit B hereto, and likewise failed to include other items, i.e. $5000 United States Government Bonds, which were located after the filing; that in the summer of 1953, deponent asked his associate, Manley P. Caldwell, Esq., to secure an estimate and later an order covering the fees of the Executrix and her counsel so that they would be available for computing the deductions for estate tax purposes, and although he commented by letter on the fact that said estimated allowances appeared excessive, he failed to realize that the inventory and appraisement was overstated by the amount of $417,000.00 until he prepared the Estate Tax Return (Form 706) in January of 1954; that immediately thereafter deponent prepared and submitted an amended inventory and appraisement.

William H. Foulk

Sworn to and subscribed before me this 5th day of March, A. D. 1954.

Rose H. O'Neal, Notary Public, (N. P. Seal)

[fol. 102] EXHIBIT A TO AFFIDAVIT

Law Offices
WILLIAM H. FOULK
228 Delaware Trust Building
Wilmington 1, Delaware

November 28, 1952

Hon. E. Harris Drew
Supreme Court Building
Tallahassee, Florida

Re: Estate of Dora B. Donner

Dear Harris:

I am enclosing copy of Mrs. Donner's will.

As I informed you the other day, Mrs. Donner had three trusts. The first, created in 1920, is divided among Mr. Donner's children, namely, Betty, Dora, Bob, and the children of Joe. Trust #7000, of which Delaware Trust Company is trustee, is divided among the various trusts for all of the children at Delaware Trust Company, namely, Betty, Dora, Bob, Dorothy, Kay, and the children of Joe, each receiving one-sixth. This trust has assets of around $1,400,000. Trust #2152, a revocable trust with Wilmington Trust Company, is to be paid over to the Executrix under the Will after the payment of the following specific legacies:

(1) $2000 to Miriam V. Moyer.

(2) $1000 to James Smith—"if he shall be in the employment of a member of my family at the time of my death".

(3) $1000 to Walter Hamilton.

(4) $1000 to each servant—"who shall have been in my employment for more than two years at the time of my death."

(5) $10,000 to Louisville Trust Company in trust for Ben Hanson, but an amendment dated July 11,

1950, provides that this $10,000 shall be paid to Dela- [fol. 103] ware Trust Company as Trustee for Donner Hanson under Trust #9023 created by Betty.

(6) $10,000 to Bryn Mawr Hospital to endow "a bed to be inscribed 'In honor of Dorothy B. Rodgers Stewart, given by her mother, Mrs. Dora Browning Donner.'"

(7) $200,000 to Delaware Trust Company to be added to the trust for Joseph Donner Winsor—No. 9022 created by Betty; and $200,000 to Delaware Trust Company to be added to the trust for Donner Hanson —No. 9023 created by Betty.

(8) The residue of this trust is to be paid to the Executrix under her will.

I approximate that the Executrix will receive $1,000,000 from this trust, and that cash and other personal property will probably bring the gross estate to $1,200,000. I estimate the Federal taxes will be around $400,000, which would result in a residuary estate of approximately $800,000.

It was a pleasure to be with you on Wednesday, and I hope some time in the near future I will be able to accept your invitation to visit with you in Tallahassee.

Yours very truly,

Wm. H. Foulk

WHF*O

TH 132 1966

STATEMENT OF **ASSETS** HELD FOR ACCOUNT OF

WILMINGTON TRUST COMPANY
WILMINGTON, DELAWARE
TRUST DEPARTMENT

[fol. 104]

EXHIBIT B TO AFFIDAVIT

CLOSE OF BUSINESS

PAR VALUE	NUMBER SHARES		DESCRIPTION OF ASSETS	RATE	MATURITY OR PAR VALUE
			CALLABLE 5TH SERIES		
50000		✓	OHIO TURNPIKE REVENUE BONDS	3 1/4	60156-92
50000		✓	SOUTH CAROLINA PUB SERV AUTH REV	2 70	70153-93
20000		✓	TAMPA FLORIDA SEWER REV	2 3/4	20155-85
25000		✓	WASH TOLL BR AUTH LONGVIEW REV	3	120152-77
			REAL ESTATE & MISC BONDS		
26400		✓	HILLSBORO PLANTATION INC DEB SELLS AS UNIT	5	901 1970
			PUBLIC UTILITY PFD STOCKS		
	250	✓	WESTERN N Y WATER CO NON CUM PFD	5	
	300	✓	STANDARD GAS & ELECTRIC CO PFD	4	
			REAL ESTATE & MISC PFD STOCKS		
	360	✓	HILLSBORO PLANTATION INC PFD	5	100
	246	✓	CUNO ENGIN CORP NON CUM CLASS A	4	25
			RAILROAD COMMON STOCKS		
	5000	✓	N Y CHICAGO & ST LOUIS RR COM		20
			PUBLIC UTILITY COMMON STOCKS		
	1910	✓	CITIZENS UTILITIES CO COMMON 33 1/3 PAR		
	2200	✓	MOUNTAIN STATES POWER CO COMMON		7 25
	6000		SAVANNAH ELECTRIC & POWER CO COM		
	600	/	COLORADO INTERSTATE GAS CO COM		5

TR 132 10M

STATEMENT OF **ASSETS** HELD FOR ACCOUNT OF

WILMINGTON TRUST COMPANY TRUSTEE
U/A WITH DORA BROWNING DONNER
DATED 3/25/35 FOR DORA BROWNING
DONNER

WILMINGTON TRUST COMPANY
WILMINGTON, DELAWARE
TRUST DEPARTMENT

2152
CLOSE OF BUSINESS NOV 20 1952

PAR VALUE	NUMBER SHARES		DESCRIPTION OF ASSETS	RATE	MATURITY OR PAR CALL
			MUNICIPAL BONDS		
25000		✓	BAYONNE NEW JERSEY	2 1/2	101 1953
20000		✓	LUZERNE CTY PA HOUSING AUTH REV	3	1215 1955
2000		✓	MONTGOMERY ALA PUBLIC IMP REFUND	5 1/2	701 1953
5000		✓	MONTGOMERY ALA PUBLIC IMP REFUND	5 1/2	701 1954
7000		✓	MONTGOMERY ALA SANITARY SEWER	5	501 1957
18000		✓	MONTGOMERY ALA PUBLIC IMP REFUND	5 1/2	701 1958
5000		✓	ROANE COUNTY TENNESSEE SCHOOL	3 1/4	901 1956
5000		✓	ROANE COUNTY TENNESSEE SCHOOL	3 1/4	901 1953
5000		✓	ROANE COUNTY TENNESSEE SCHOOL	3 1/4	901 1954
5000		✓	ROANE COUNTY TENNESSEE SCHOOL	3 1/4	901 1955
5000		✓	ROANE COUNTY TENNESSEE SCHOOL	3 1/4	901 1958
5000		✓	ROAN. COUNTY TENNESSEE SCHOOL	3 1/4	901 1959
9000		✓	E JEFFERSON WATERWORK DIST 1 LA LOUISIANA CALLABLE	3 1/2	20161-69
16000		✓	E JEFFERSON WATERWORK DIST 1 LA LOUISIANA CALLABLE	3 1/2	20161-70
11000		✓	E JEFFERSON WATERWORK DIST 1 LA LOUISIANA CALLABLE	3 1/2	20161-71
4000		✓	E JEFFERSON WATERWORK DIST 1 LA LOUISIANA CALLABLE	3 1/2	20161-72
25000		✓	EL PASO TEXAS FUNDING	4 3/4	915 1961
50000		✓	IMPERIAL IRRIGATION DIST CALIF C	3 1/4	10168-83
10000		✓	PORT HOOD RIV ORE BR REV CALL	3 1/2	1201 1975
10000		✓	OKLAHOMA TURNPIKE AUTH REV	3	80152-90
50000		✓	OKLAHOMA TURNPIKE AUTH REV CALL	3 3/4	801 1990
4000		✓	PORT NEW YORK GEN AUTH REF REV	3 1/4	815 1977

FR 132 1066

STATEMENT OF **ASSETS** HELD FOR ACCOUNT OF

WILMINGTON TRUST COMPANY
WILMINGTON, DELAWARE
TRUST DEPARTMENT

[fol. 106]

CLOSE OF BUSINESS

PAR VALUE	NUMBER SHARES		DESCRIPTION OF ASSETS	RATE	MATURITY OR PAR VALUE
	1000	✓	WEST PENN ELECTRIC CO COMMON		
			INDUSTRIAL COMMON STOCKS		
	2000	✓	AIR ASSOCIATES INC COMMON		1
	600	✓	BLOCKSON CHEMICAL CO COMMON		7 50
	220	✓	ST JOSEPH LEAD CO COMMON		10
	3651	✓	DEEP ROCK OIL CORP COMMON		1
	6000	✓	CONNECTICUT FILTER CORP COMMON		1
			REAL ESTATE & MISC COMMON		
	450	✓	HILLSBORO PLANTATION INC COMMON		100
			SELLS AS UNIT		
	50	✓	HILLSBORO PLANTATION COMMON		100
	3314	✓	CUNO ENGINEERING CORP COMMON		1
			NOTES		
70000		✓	NOTE HILLSBORO PLANTATION INC DATED 3/11/49	4	
17000		✓	NOTE HILLSBORO PLANTATION INC DATED 9/1/50	5	901 1970
			58556600		

[fol. 107] WILL
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AFFIDAVIT OF MANLEY P. CALDWELL TO PETITION

STATE OF FLORIDA
COUNTY OF PALM BEACH

Manley P. Caldwell, being duly sworn, deposes and says:

I am a member of the Bar of Palm Beach County, Florida and have been such member for more than 28 years. I am a member of the firm of Wideman, Caldwell, Pacetti & Robinson, which is Florida counsel for the Estate of Dora Browning Donner, being administered in the County Judge's Court of Palm Beach County, Florida. We were employed as such Florida counsel by William H. Foulk of Wilmington, Delaware, General Counsel for the Estate.

When I advised Mr. Foulk of the necessity for filing an Appraisement and Inventory in this Estate, he said that in view of his familiarity with the background of the assets of the Estate, he would prepare this instrument and forward it to me for completion of execution and filing. I furnished him with a copy of a similar instrument which had been used in another Estate we had handled, to be used as a form in the preparation of the one in this Estate.

In due course Mr. Foulk forwarded to me the Appraisement and Inventory which he had prepared and which was executed by Robert W. Hill, one of the appraisers, who resided in Wilmington, Delaware. I obtained the execution of the instrument by Blaine Webb, the other appraiser, and by Elizabeth Donner Hanson, Executrix of the Estate, and thereupon filed the same on or about June 26, 1953.

While I was generally familiar with the Trust created by Mrs. Donner on March 25, 1935 and with the subsequent exercise by her of powers of appointment, I did not know the value of the assets in this Trust. When I received the Appraisement and Inventory, I assumed that there was in-
[fol. 108] cluded therein only that portion of said Trust which had passed to the Executrix under the decedent's powers of appointment, and was under the impression that the portion of the Trust which had not passed to said Execu-

trix, amounting to approximately $417,000.00, had been excluded from the assets reported in such instrument. Had I realized that these items which I thought had been excluded were in fact included, I would have immediately called to Mr. Foulk's attention the fact that under the Florida law, only the property to which the Executrix is legally entitled is includable in the Appraisement and Inventory, regardless of the tax incidences.

The fact that the Appraisement and Inventory included these non-Estate Assets did not come to my attention until on or about February 1, 1954, some time after application for and entry of order fixing fees on December 23, 1953, based upon the Appraisement and Inventory.

Manley P. Caldwell

Sworn to and subscribed before me this 18th day of March, 1954.

J. Coyle, Notary Public, State of Florida, My Commission expires: March 24, 1957.

(N. P. Seal)

[fol. 109] ATTACHMENT TO REPLY, ETC.

IN THE COUNTY JUDGE'S COURT
PALM BEACH COUNTY, FLORIDA

No. 10,394

IN RE:

ESTATE OF DORA BROWNING DONNER, Deceased.

AMENDED

APPRAISEMENT AND INVENTORY

Blaine Webb and Robert W. Hill, heretofore appointed as appraisers in this Estate, having heretofore reported that they have appraised all of the property of the Estate of Dora

Browning Donner so far as known to them, hereby file this Amended Appraisement and Inventory, including therein additional property and information not known to them at the time of making their original report; that said property, together with the value thereof as of November 20, 1952, the date of decedent's death, is as follows:

CASH			
Wilmington Trust Company, Wilmington, Delaware	$ 109,543.66		
Fidelity-Philadelphia Trust Co., Philadelphia, Pa.	25,293.00		
Donner Agency Account Philadelphia, Pa.	13,901.38		
First National Bank in Palm Beach Palm Beach, Florida	2,750.10	$	151,488.14
STOCKS AND BONDS			
5M U. S. Savings Bonds, Series E, dated June 1942	5,000.00		
$250 5% Bond-Play & Players 1714 Delancey St., Philadelphia	62.35		
[fol. 110]			
1 sh. Everglades Protective Syn.	1,000.00		
1 sh. Bath & Tennis Club, B (VTC)	25.00		6,087.35
REAL ESTATE			
582 South Ocean Boulevard Palm Beach, Florida		$	75,000.00
PERSONAL PROPERTY			
Cadillac Sedan	$ 3,100.00		
Jewelry	25,715.00		
Household Furnishings:—			
582 S. Ocean Blvd. Palm Beach, Florida	$5,704.12		

Ryan & Christie Storage Bryn Mawr, Pa. and Belgravia Hotel, Phila.	$8,149.60	$13,853.72
Accrued income, Wilmington Trust Company—Trust #754		3,435.42
Prepaid Insurance		730.12
Deposits for Utilities (582 S. Ocean Blvd., P.B.)		103.62
Deposit—Macy's Bank, New York		40.82
Prepaid Rental, Safe Deposit Box		12.00 $46,990.70

TRUST FUND UNDER AGREEMENT DATED MARCH 25, 1935, WITH WILMINGTON TRUST COMPANY, TRUSTEE. (DESIGNATED TRUST NO. 2152)

Cash		$ 27,079.16
Municipal Bonds:		
25M Bayonne, N. J. 2½ due 1/1/53		25,000.00
20M Luzerne City Pa. Housing Auth. Rev. 3 due 12/15/55		20,000.00
2M Montgomery, Ala. Public Imp. Ref. 5½ due 7/1/53		2,025.00
[fol. 111]		
5M Montgomery, Ala. Public Imp. Ref. 5½ due 7/1/54		5,268.75
7M Montgomery, Ala. Sanitary Sewer 5 due 5/1/57		7,787.50
18M Montgomery, Ala. Public Imp. Ref. 5½ due 7/1/58		20,970.00
5M Roane City, Tenn. School 3¼ due 9/1/56		5,156.25
5M Roane City, Tenn. School 3¼ due 9/1/53		5,006.25
5M Roane City, Tenn. School 3¼ due 9/1/54		5,050.00

(Municipal Bonds—continued)

5M Roane City, Tenn. School 3¼ due 9/1/55	5,093.75
5M Roane City, Tenn. School 3¼ due 9/1/58	5,181.25
5M Roane City, Tenn. School 3¼ due 9/1/59	5,187.50
9M E. Jefferson Waterwork) Dist. 1, La. 3½ due) 2/1/61-69)	
16M E. Jefferson Waterwork) Dist. 1 La. 3½ due) 2/1/61-70)	39,200.00
11M E. Jefferson Waterwork) Dist. 1, La. 3½ due) 2/1/61-71)	
4M E. Jefferson Waterwork) Dist. 1, La. 3½ due) 2/1/61-72)	
25M El Paso, Texas Funding 4¾ due 9/15/61	29,593.75
50M Imperial Irrigation Dist. Cal. 3¼C due 1/1/68-83	49,000.00
10M Port Hood Riv. Dre. Br. Rev. Call 3½ due 12/1/75	9,500.00

[fol. 112]

10M Oklahoma Turnpike Auth. Rev. 3 due 8/1/52-90	9,000.00
50M Oklahoma Turnpike Auth. Rev. Call 3¾ due 8/1/90	49,000.00
4M Port of N. Y. Gen. Auth. Ref. Rev. 3¼ due 8/15/77	4,080.00
50M Ohio Turnpike Rev. Bonds 3¼ due 6/1/56-92	51,250.00
50M S. Carolina Pub. Serv. Auth. Rev. 2.70 due 7/1/53-93	43,500.00
20M Tampa, Fla. Sewer Rev. 2¾ due 2/1/55-85	17,725.00
25M Wash. Toll Br. Auth. Longview Rev. 3 due 12/1/52-77	22,562.50

Notes:

$70,000 Hillsboro Plantation Inc. 5% due 3/11/69 Int. to 11/20/52	$82,920.60
17,000 Hillsboro Plantation Inc. 5% due 9/1/70 Int. to 11/20/52	19,067.71
26,400 Hillsboro Plantation Inc. 5% due 9/1/70 Int. to 11/20/52	28,229.78

Stocks:

250 shs. Western N. Y. Water Co. non cum. pfd. 5% @ 93.	23,250.00
300 shs. Standard Gas & Elec. Co. $4 pfd. (no par) @ 109 5/16	32,793.75
5000 shs. N. Y., Chicago & St. Louis RR. com. (20 par) @ 42 5/8	213,125.00

[fol. 113]

1910 shs. Citizens Utilities Co. Com. (33⅓ par) @ 13⅜	25,546.24
2200 shs. Mountain States Power Co. (7.25 par) @ 13½	29,700.00
600 shs. Colorado Interstate Gas Co. Com. (5 par) @ 30¼	18,150.00
1000 shs. West Penn Electric Co. Com. (no par) @ 35¼	35,250.00
2000 shs. Air Associates, Inc. Com. (1 par) @ 8¼	16,500.00
600 shs. Blockson Chemical Co. Com. (7.50 par) @ 25⅛	15,075.00
220 shs. St. Joseph Lead Co. Com. (10 par) @ 39 9/16	8,703.75
3651 shs. Deep Rock Oil Corp. Com. (1 par) @ 45⅞	167,489.63
246 shs. Cuno Engin. Corp. Non Cum. 4% Class A (25 par) @ 70	17,220.00
331 shs. Cuno Engin. Corp. Com. (1 par) @ 40	13,240.00
6000 shs. Connecticut Filter Corp. Com. (1 par) @ 1	6,000.00

360 shs. Hillsboro Plantation Inc. 5% Conv. Pfd. @ 100	$36,000.00	
500 shs. Hillsboro Plantation Inc. Com. @ 42	21,000.00	
6000 shs. Savannah Electric & Power Co. Com. @ 42½	255,000.00	
	$1,527,478.13	

[fol. 114]

Reduction by gifts to donees in Supplemental Agreement dated December 21, 1949, as amended July 7, 1950	417,000.00	$1,110,478.13
TOTAL ASSETS		$1,390,044.32

Respectfully submitted,

ROBERT W. HILL
BLAINE WEBB
As Appraisers as aforesaid.

February 26, 1954.

The undersigned Executrix accepts the foregoing Amended Appraisement and adopts it as her Inventory, as such Executrix.

ELIZABETH DONNER HANSON

Elizabeth Donner Hanson as
Executrix of the Estate of
Dora Browning Donner, Deceased.

[fol. 115] ATTACHMENT TO REPLY ETC.

PROBATE ORDER
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IN THE COUNTY JUDGE'S COURT IN AND FOR PALM BEACH COUNTY, FLORIDA

No. 10,394

In Re:

ESTATE OF DORA BROWNING DONNER, Deceased.

ORDER

This cause was presented upon

1. Motion of Katherine N. R. Denckla, individually and Elwyn L. Middleton, as guardian of the property of Dorothy Browning Stewart, also known as Dorothy B. Stewart and Dorothy B. Rodgers Stewart, an incompetent person, to dismiss the petition of Elizabeth Donner Hanson for permission to file an amended appraisement and inventory; and

2. Motion of Katherine N. R. Denckla, individually, and Elwyn L. Middleton, as guardian of the property of Dorothy Browning Stewart, also known as Dorothy B. Stewart and Dorothy B. Rodgers Stewart, an incompetent person, to strike the answer of Elizabeth Donner Hanson, as Executrix of the above styled estate, to the petition of the aforesaid movants for the production of assets; and

3. Objections of Katherine N. R. Denckla, individually and Elwyn L. Middleton, as guardian of the property of Dorothy Browning Stewart, also known as Dorothy B. Stewart and Dorothy B. Rodgers Stewart, an incompetent person, to the First Report of the Executrix

and the Court having heard argument of counsel;

[fol. 116] It is, thereupon, Ordered, Adjudged and Decreed that action on such matters be and the same is hereby stayed until the further order of this Court.

Done and Ordered at West Palm Beach, Florida, this 9th. day of April, 1954.

Richard P. Robbins, County Judge.

(Seal County Judge, Palm Beach County, State of Florida)

IN THE COUNTY JUDGE'S COURT OF
PALM BEACH COUNTY, FLORIDA

I, the undersigned, Clerk of the County Judge's Court in and for Palm Beach County, Florida, the same being a Court of Record and having probate jurisdiction, Do Hereby Certify that the foregoing is a true and correct copy of Petition filed on March 19th, 1954, recorded in Will Book 80, Page 72; Order dated and filed for record in this Court on April 9th, 1954, recorded in Probate Order Book 82, Page 436, in the matter of the estate of

Dora Browning Donner, Deceased,

as the same appears from the records and files of the County Judge's Office of Palm Beach County, Florida.

In Testimony Whereof, I have hereunto set my hand and seal of said Court at West Palm Beach, Florida, this the 20th day of August, A. D. 1954.

Ruby M. Ball, Clerk of the County Judge's Court of Palm Beach County, Florida.

(Seal)

[fol. 117] IN CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

ANSWER OF WILBUR E. COOK AS GUARDIAN AD LITEM FOR DEFENDANT WILLIAM DONNER DENCKLA—Filed August 25, 1954

Comes now Wilbur E. Cook as guardian ad litem for the defendant, William Donner Denckla, and for an answer to the bill for declaratory decree filed herein says that he admits the facts alleged therein and thereby.

Wherefore said guardian most respectfully submits the rights, titles and interests of said minor to the tender consideration, care and protection of this Honorable Court.

Wilbur E. Cook, as guardian ad litem for defendant William Donner Denckla, 801 Harvey Building, West Palm Beach, Florida.

IN CIRCUIT COURT OF FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

ORDER DISCHARGING WILBUR E. COOK AS GUARDIAN AD LITEM FOR DEFENDANT PAULA BROWNING DENCKLA—August 25, 1954

It having been suggested verbally to the Court by Wilbur E. Cook in the presence of D. H. Redfearn, C. Robert Burns and Manley P. Caldwell, Esquires, that the defendant Paula Browning Denckla became twenty-one years of age on the 12th day of April, A. D. 1954; upon consideration thereof it is

[fol. 118] Ordered, adjudged and decreed that Wilbur E. Cook shall be and he hereby is discharged herein as guardian ad litem for the defendant, Paula Browning Denckla; and it is further

Ordered, adjudged and decreed that the Court hereby reserves the right to take appropriate action concerning

the compensation of said discharged guardian for his services rendered during the time he acted as such guardian.

Copy furnished counsel.

Done and ordered in Chambers at West Palm Beach, Florida, on this 25th day of August, A. D. 1954.

Jos. S. White, Circuit Judge.

IN CIRCUIT COURT OF FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

INJUNCTIVE ORDER AND ORDER ON MOTION TO STAY—
August 25, 1954

This cause was presented after due notice upon application for injunction and other relief filed herein by the plaintiffs under date of August 16, 1954, and upon motion to stay filed on August 3, 1954, by the defendants, Elizabeth Donner Hanson, individnally and as executrix of the will of Dora Browning Donner, deceased, and as guardian ad litem for Donner Hanson and Joseph Donner Winsor, and William Donner Roosevelt, individually, and the Court having considered the sworn application and the sworn reply thereto filed by the aforesaid defendants, and having heard argument of counsel and being advised in the premises, it is, thereupon,

[fol. 119] Ordered, Adjudged and Decreed:

1. That the aforesaid motion to stay be and the same is hereby denied.

2. That the relief sought in the aforesaid application for injunction be and the same is hereby granted, and the defendant, Elizabeth Donner Hanson be and she is hereby enjoined from further prosecuting, either individually or through counsel, that certain complaint for declaratory judgment filed by her in the Court of Chancery of the State of Delaware in and for New Castle County in which the said Elizabeth Donner Hanson, as executrix and trustee under the last will of Dora Browning Donner, deceased,

is plaintiff, and Wilmington Trust Company, a Delaware corporation, as trustee, et al., are defendants, until the further order of this court.

Copy furnished counsel.

Done and Ordered, this August 25, 1954.

Jos. S. White, Circuit Judge.

In Circuit Court of Fifteenth Judicial Circuit in and for Palm Beach County, Florida

Motion for Summary Final Decree—Filed November 19, 1954

Now come the plaintiffs in the above stated case and file this motion for summary final decree on the following grounds:

1. This case is at issue upon decrees pro confesso entered against all the defendants except: (a) the defendants [fol: 120] Elizabeth Donner Hanson, individually and as executrix of the will of Dora Browning Donner, deceased, and as guardian ad litem for Donner Hanson and Joseph Donner Winsor; (b) the defendant William Donner Roosevelt, individually; (c) the defendant Paula Browning Denckla; and (d) the defendant William Donner Denckla, a minor, for whom a guardian ad litem has been appointed herein.

2. The excepted defendants named above have filed an answer in this case which raise only questions of law, and it is unnecessary to take any evidence in this case.

3. The pleadings in this case disclose that the plaintiffs are entitled to a summary final decree granting them the relief prayed for in their original complaint.

Wherefore, movants pray that this Honorable Court enter a summary final decree in favor of the plaintiffs in the above stated case.

C. Robert Burns, Redfearn & Ferrell, By C. Robert Burns, Attorneys for Plaintiffs.

In Circuit Court of Fifteenth Judicial Circuit in and for Palm Beach County, Florida

Answer of Paula Browning Denckla—Filed November 22, 1954

The defendant Paula Browning Denckla, who became of age on April 12, 1954, for her answer to the complaint herein says that she admits the facts therein alleged.

Paula Browning Denckla.

[fol. 121]

Chan. 31,980

In the Supreme Court of Florida
June Term, A. D. 1954

Tuesday, November 23, 1954.

Elizabeth Donner Hanson, Individually, and as Executrix of Will of Dora Browning Donner Deceased and as Guardian ad litem for Donner Hanson and Joseph Donner Winsor, and William Donner Roosevelt, Individually, Petitioners,

v.

Katherine N. R. Denckla, Individually, and Elwyn L. Middleton, as Guardian of the Property of Dorothy Stewart, also known as Dorothy B. Stewart and Dorothy B. Rodgers Stewart, an incompetent person, Respondents.

Corrected Order of Supreme Court of Florida Denying Petition for Writ of Certiorari—Filed November 26, 1954

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the Circuit Court for Palm Beach County in said cause bearing date August 25, 1954, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A True Copy, Test: Guyte P. McCord, Clerk Supreme Court (Seal of Supreme Court of the State of Florida).

[fol. 122] IN CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

MOTION OF CERTAIN DEFENDANTS FOR SUMMARY FINAL DECREE—Filed December 3, 1954

Come now the defendants, Elizabeth Donner Hanson, Individually, as Executrix of the Will of Dora Browning Donner, Deceased, and as Guardian ad litem for Donner Hanson and Joseph Donner Winsor, and William Donner Roosevelt, Individually, by their undersigned attorneys, and move the Court to enter, pursuant to Florida Equity Rule 40, a summary final decree in these defendants' favor dismissing the action on the ground that:

1. It appears from the pleadings herein and the affidavits of C. Kenneth Baxter, Paul D. Lovett and Joseph W. Chinn, Jr., attached to this motion and made a part hereof, that this Court lacks jurisdiction herein for the reasons alleged in Paragraph 10 of these defendants' answer, and that there is no genuine issue as to any material fact on said jurisdictional point and that these defendants are entitled to a final decree of dismissal, as a matter of law.

2. These defendants further move, in the alternative, that in the event the Court denies aforesaid motion, that it enter, pursuant to said Rule, summary final decree in these defendants' favor declaring and decreeing that the exercise of power of appointment dated December 3, 1949, as amended on July 7, 1950, set forth in the pleadings, is valid and effective, and declaring and decreeing that only such portion of the property covered by the Trust identified [fol. 123] in the pleadings which was directly appointed to the Executrix by the exercise of said power, as amended, passed into the residuary Estate of the Decedent. These defendants so move on the ground that it appears from the pleadings herein and aforesaid supporting affidavits that there is no genuine issue as to any material fact and that these defendants are entitled to such summary final decree as a matter of law.

Wideman, Caldwell, Pacetti & Robinson, Manley P. Caldwell, Madison F. Pacetti, Attorneys for aforesaid Defendants.

Wm. H. Foulk, Wilmington, Delaware, Of Counsel for aforesaid Defendants.

[fol. 124] EXHIBIT A TO MOTION

AFFIDAVIT OF C. KENNETH BAXTER

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA,

On this 30th day of November, 1954, personally appeared before me, the undersigned, a Notary Public for the State and County aforesaid, C. KENNETH BAXTER, who being by me duly sworn did depose and say:

1. From 1931 until September 1940 I was employed as an investment advisor by William H. Donner, the husband of Dora Browning Donner, and/or members of his family and/or companies owned or controlled by them. I then became secretary and treasurer of Donner Estates, Inc. (later named The Donner Corporation), an investment advisor company, and from time to time thereafter I served as secretary, treasurer, vice president, and since January 1, 1950, president of said corporation.

2. Donner Estates, Inc., was incorporated on September 11, 1940 by Dora Donner Ide to act as investment counsel to the trustees under a number of trusts created by William H. Donner and by certain members of his family. Its name was changed to The Donner Corporation on June 5, 1947. Its stock, consisting of 100 shares of par value of $10.00 each was originally owned by Dora Donner Ide (a daughter of William H. Donner and Dora Browning Donner). On or about October 28, 1940, Dora Donner Ide transferred the shares of Donner Estates, Inc., to the Wilmington Trust Company as trustee for the benefit of the issue of William H. Donner. The "issue" were defined in the agreement to include Dorothy B. R. Stewart and

Katherine N. R. Denckla who had been adopted by William H. Donner.

3. From 1931 until the present my activities and business and personal relationship with William H. Donner and [fol. 125] members of his family were such that I became generally familiar with the provisions of the numerous trusts created by William H. Donner and members of his family, and the personnel of the family.

4. William H. Donner and his first wife, Adella May Newson, had two children, Robert N. Donner and Joseph W. Donner. They were divorced in 1907. Robert N. Donner had two children, Robert Donner, Jr., and Margaret H. Donner, Jr. Joseph W. Donner had two children, Joseph W. Donner, Jr., and Carroll E. Donner, Jr. I am advised that none of the aforementioned issue of William H. and Adella May Donner are involved in this litigation.

5. William H. Donner married his second wife, Dora Browning Rodgers, on March 27, 1909. The latter was the widow of J. Norwood Rodgers who died on January 20, 1905. Dora Browning Rodgers and J. Norwood Rodgers had two children, Katherine N. Rodgers who married Paul Denckla, and Dorothy B. Rodgers who married John Stewart, who was president of The Donner Corporation from October 1940 to December 31, 1949. Paul Denckla and Katherine N. Rodgers Denckla had two children, Paula Browning Denckla and William Donner Denckla. John Stewart and Dorothy B. Rodgers Stewart had two children, Dora Stewart who married Lawrence Lewis, Jr., and Mary Washington Stewart who married David Boyde Borie.

6. Following the marriage of William H. Donner and Dora Browning Rodgers the following children were born to them: Elizabeth Donner, Dora Donner, and William H. Donner, Jr. The latter died without issue. Elizabeth Donner married Elliott Roosevelt and had one child by him, William Donner Roosevelt. Following a divorce, Elizabeth Donner married Curtin Winsor and had two children by him, Curtin Winsor, Jr., and Joseph Donner Winsor. Following a second divorce, Elizabeth Donner married Benedict Hanson and by him had one child, Donner Hanson.

[fol. 126] Dora Donner married John Jay Ide and they have no children. William H. Donner died on November 3, 1953, and Dora Browning Donner died on November 20, 1952.

7. Dora Browning Donner entered into an agreement of trust dated March 25, 1935 with the Wilmington Trust Company as trustee. I am familiar with the terms of that agreement. The value of the assets transferred to the trustee at the time of the creation of the trust was approximately $291,420.85. Prior to December 13, 1940 the persons acting as advisors to the trustee under paragraph 5 of the agreement were successively, William H. Donner; J. Edward Hairsine, and myself or either of us; and J. Edward Hairsine, John Stewart and myself, or any of us. On December 13, 1940 The Donner Corporation was named successor advisor and has continued in that capacity. The officers of The Donner Corporation who from time to time were authorized to act on its behalf in performing its functions as advisor to said trust were John Stewart, J. Edward Hairsine, John T. Lyons, H. R. Baxter, Edward V. Kruger, W. R. Yarnall and myself. None of these persons, with the exception of John Stewart, were related to Dora Browning Donner. Dora Browning Donner was at no time either an officer, director or stockholder of the corporation.

8. At no time did Dora Browning Donner either directly or indirectly attempt to direct, suggest or consult with the advisors under paragraph 5 of the trust agreement dated March 25, 1935 with respect to any phase of their duties as such advisors, but on the contrary, such advisors performed their duties as advisors solely in accordance with their own best independent judgments. In the performance of their duties as advisors, they instructed Wilmington Trust Company as trustee to purchase, sell or otherwise deal with the securities held in trust without [fol. 127] ever advising Dora Browning Donner with respect thereto either before or after action was taken by the Wilmington Trust Company or at any other time.

9. At the time of the appointment dated December 3, 1949 under the agreement of March 25, 1935 between Dora Browning Donner and Wilmington Trust Company as

trustee, and at all times thereafter, Katherine N. R. Denckla and Dorothy B. R. Stewart and their respective issue had substantial incomes and/or interests from and in various other trusts.

10. During 1940 and 1941, William H. Donner created trusts for the benefit of each of his then living grandchildren including then living children of his adopted daughters Katherine N. Rodgers Denckla and Dorothy B. Rodgers Stewart, namely, Paula Browning Denckla, William Donner Denckla, Dora Stewart Lewis, Mary Washington Stewart Borie, William Donner Roosevelt and Curtin Winsor, Jr. Neither Donner Hanson nor Joseph Donner Winsor had been born when said trusts were created and as a result no provision was made for them under said trusts. Subsequently, Donner Hanson and Joseph Donner Winsor acquired beneficial interests under other trusts which were relatively small in value as compared with the aforementioned 1940 and 1941 trusts. On December 3, 1949 and at all times until the death of Dora Browning Donner the value of the corpus of each of the respective trusts under which the grandchildren (other than Joseph Donner Winsor and Donner Hanson) of William H. Donner had beneficial interests exceeded by more than $200,000 the corpus of the trusts for Joseph Donner Winsor and Donner Hanson, and when increased by the assets appointed to them by the instruments dated December 3, 1949 and July 7, 1950 exercising the power of appointment granted to Dora Browning Donner by the agreement [fol. 128] dated March 25, 1935 between her and the Wilmington Trust Company as trustee, the latter trusts are each of a substantially lesser value than the corpus of each of the trusts for each of the other grandchildren.

/s/ C. Kenneth Baxter

Sworn to and subscribed before me the day and year first above written.

/s/ Miriam V. Moyer
Notary Public,
Commonwealth of Pennsylvania
My Commission expires: Jan. 29, 1955
(N. P. Seal)

[fol. 129] EXHIBIT B TO MOTION

AFFIDAVIT OF PAUL D. LOVETT

STATE OF DELAWARE,
COUNTY OF NEW CASTLE,

On this 30th day of November, 1954, personally appeared before me the undersigned, a Notary Public of the State and County aforesaid, PAUL D. LOVETT, who being by me duly sworn did depose and say:

1. That he is and at all times hereinafter referred to has been a vice-president of, and in charge of the Trust Department of, Delaware Trust Company.

2. That on November 26, 1948, a Trust Agreement (No. 9023) was entered into between Elizabeth Donner Hanson and Delaware Trust Company as Trustee for the benefit of Donner Hanson and others, and on the same date a Trust Agreement (No. 9022) was entered into between Delaware Trust Company as Trustee and Elizabeth Donner Hanson for the benefit of Joseph Donner Winsor and others, and that at all times since November 26, 1948 the trusts have been in full force and effect and have been administered by the Delaware Trust Company as Trustee.

3. The assets held by the Delaware Trust Company as trustee under the two trusts referred to in paragraph 2 hereof have been located exclusively within the State of Delaware at all times since the inception of such trusts.

4. The Trustee has no office or other place of business outside of the State of Delaware, transacts no business outside of the State of Delaware, and all of its duties as Trustee under the two aforementioned trusts have been performed within the State of Delaware.

/s/ Paul D. Lovett

SWORN to and subscribed before me the day and year first above written.

/s/ Rose H. O'Neal, Notary Public, State of Delaware. My commission expires: 6/15/55.

(N. P. Seal)

[fol. 130] EXHIBIT C TO MOTION

AFFIDAVIT OF JOSEPH W. CHINN, JR.

STATE OF DELAWARE,
COUNTY OF NEW CASTLE,

On this 1st day of December, 1954, personally appeared before me, the undersigned, a Notary Public for the State and County aforesaid, JOSEPH W. CHINN, JR., who being by me duly sworn did depose and say that:

1. At all times hereinafter mentioned, I have been an officer of the Wilmington Trust Company of Wilmington, Delaware, and I am presently a vice-president and the trust officer thereof.

2. On or about March 25, 1935, the Wilmington Trust Company (hereinafter "Trustee") executed in Wilmington, Delaware, an agreement dated March 25, 1935 between itself as Trustee and Dora Browning Donner (hereinafter "Trust Agreement") which created a trust with respect to securities described in Schedule A attached to the Trust Agreement and such other securities or property as might thereafter be received by the Trustee under the Trust Agreement. Either at the time when the Trust Agreement was executed by the Trustee or prior thereto, the same had been executed by Dora Browning Donner. A copy of the Trust Agreement (with Schedule A thereto) is attached to the bill of complaint filed herein.

3. At or about the time when the Trust Agreement was executed by the Trustee, Dora Browning Donner assigned, transferred and delivered to the Trustee in Wilmington, Delaware, the securities listed on Schedule A attached to the Trust Agreement. From time to time Dora Browning Donner, acting in accordance with the terms of the Trust Agreement transferred additional sums of money and securities to the Trustee to be held by it under the Trust Agreement. The securities initially and subsequently so [fol. 131] delivered were either endorsed or the Trustee received stock powers with respect thereto to the extent, if any, required to vest title thereto in the Trustee; and

the sums of money (represented by checks) subsequently transferred in trust were likewise delivered to the Trustee in Wilmington, Delaware. At no time was title to any of the securities listed in Schedule A or any other securities or property subsequently held in the corpus of the trust transferred by the Trustee to Dora Browning Donner or to anyone else, except (a) such transfers as were from time to time in accordance with the direction of the advisor or advisors named in or designated pursuant to paragraph 5 (as amended from time to time) of the Trust Agreement, (b) such transfers as were effected subsequent to the death of Dora Browning Donner, referred to in paragraph 8 hereof, and (c) the transfer of the $75,000 to Dora Browning Donner referred to in paragraph 6 hereof.

4. At all times from and after the establishment of the trust, the Trustee has held the title to the assets comprising the trust either in its own name or in the name of nominees who were at all times under its control, that all of such assets have at all times been located within the State of Delaware, and that all acts of the Trustee in administering the trust have taken place within the State of Delaware.

5. The instruments executed by Dora Browning Donner on April 6, 1935, October 11, 1939, December 3, 1949 and July 7, 1950 (Exhibits 3, 4, 5 and 6 to the bill of complaint filed herein, respectively), under which Dora Browning Donner exercised the power of appointment granted to her by the Trust Agreement became effective upon their delivery to the Trustee in Wilmington, Delaware, on or about the dates indicated by the signature of the Trustee appearing at the bottom of each of such instruments.

[fol. 132] 6. Although by paragraph 10 of the Trust Agreement Dora Browning Donner reserved the right to amend, alter or revoke the Agreement in whole or in part, Dora Browning Donner never attempted to exercise such right, except for two amendments to paragraph 5 dealing with the advisor and its compensation and for the revocation of the trust as to $75,000 on April 2, 1947, which amount was replaced in the trust on December 22, 1947.

7. At no time did Dora Browning Donner attempt to direct, suggest, consult with or advise the Trustee with respect to any phase of the administration of the trust, but on the contrary the Trustee performed all of its duties in accordance with its own best independent judgment, except in so far as it followed the instructions of the advisor or advisors acting in accordance with paragraph 5 of the Trust Agreement.

8. I am advised that Dora Browning Donner died on November 20, 1952, that on that date the Trustee held under the Trust Agreement assets having the aggregate values of $1,493,649.91 and that between January 9, 1953 and March 30, 1953, the Trustee, acting pursuant to instruments executed by Dora Browning Donner on December 3, 1949, and July 7, 1950 (Exhibits 5 and 6 attached to the bill of complaint herein), transferred and delivered the following sums of money to the following:

Date	Amount	Distributed to
January 9, 1953	$ 2,000	Miriam V. Moyer
January 10, 1953	1,000	Dorothy Doyle
January 12, 1953	1,000	Mary Glackens
January 12, 1953	1,000	Walter Hamilton
January 12, 1953	1,000	James Smith
January 12, 1953	1,000	Ruth Brenner
February 11, 1953	10,000	Bryn Mawr Hospital

Of the aforementioned persons, I am advised that Dorothy [fol. 133] Doyle, Mary Glackens, and Ruth Brenner were servants who had been in the employment of Dora Browning Donner for more than two years at the time of her death and hence were the persons entitled under paragraph 2(a)(iv) of the instrument dated December 3, 1949 to the payments so made to them. On March 30, 1953 the Trustee assigned, transferred and delivered securities and cash having an aggregate value of $200,000 to the Delaware Trust Company, Trustee under Agreement dated November 26, 1948, with Elizabeth Donner Hanson, for Donner Hanson and others; and on March 30, 1953 the Trustee assigned, transferred and delivered securities and cash having an aggregate value of $200,000 to the Delaware Trust Company, Trustee under Agreement dated November 26, 1948, with

Elizabeth Donner Hanson, for Joseph Donner Windsor and others; and in February, 1954, the Trustee deposited the sum of $455,777.81 in the Wilmington Trust Company for the account of Elizabeth Donner Hanson, as Executrix under the Will of Dora Browning Donner.

9. On January 22, 1954 when the bill of complaint in this action was filed, the Trustee held under the Trust Agreement securities and monies all of which were located within the State of Delaware; and at all times since the institution of the action the Trustee has held securities and cash under the Trust Agreement in Wilmington, Delaware.

10. The Trustee has no office or other place of business outside of the State of Delaware and transacts no business outside of this State.

11. The Trust Agreement is one of two trust agreements between Dora Browning Donner and the Wilmington Trust Company under which the latter acted as Trustee, and at no time either before or after March 25, 1935 has Dora Browning Donner had an agency account of any kind with the Wilmington Trust Company.

[fol. 134] 12. When assets held under the Trust Agreement were purchased and sold it was not the practice of the Trustee to advise Dora Browning Donner of the transactions, but information as to portfolio changes were given to the advisor periodically every three months as is customarily done by the Wilmington Trust Company as Trustee under many other trusts in giving advice as to investment changes.

13. During the time when Donner Estates, Inc. (the name of which was subsequently changed to The Donner Corporation) was acting as advisor under paragraph 5 of the Trust Agreement, the individuals who acted on behalf of the corporate advisor in its relations with the Trustee were C. K. Baxter, John Stewart, H. R. Baxter and Edward V. Kruger.

14. Trustee was not advised that the validity or effectiveness of the Trust Agreement or the exercise of the

power of appointment thereunder was or would be disputed or assailed until after January 1, 1954, or more than one year after the date of death of Dora Browning Donner and consequently after the date when it was required to make distribution in accordance with the terms of the appointment dated December 3, 1949.

/s/ Joseph W. Chinn, Jr.

Sworn to and subscribed before me the day and year first above written.

/s/ Marian K. Graham, Notary Public, State of Delaware. My commission expires Oct. 7, 1956.

(N. P. Seal)

[fol. 135] On the 7th day of December, 1954, Certified Copy of Order of Court of Chancery for New Castle County, Delaware was filed in the words and figures following, to-wit:

CERTIFIED COPY

OF

ORDER OF COURT OF CHANCERY
FOR NEW CASTLE COUNTY, DELAWARE

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 531

ELIZABETH DONNER HANSON, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased, Plaintiff.

v.

WILMINGTON TRUST COMPANY, et al., Defendants.

ORDER

AND NOW, to wit this 2nd day of December, 1954, the application of Edwin D. Steel, Jr., guardian ad litem for

Joseph Donner Winsor and Donner Hanson, to fix a date for hearing his motion for summary judgment in conformity with paragraphs (a), (b) and (c) of the prayers of the answer filed by him, having come on to be heard, and David F. Anderson, attorney for Delaware Trust Company, Trustee, and Caleb S. Layton, attorney for Wilmington Trust Company, Trustee, having appeared in support of said application, and Arthur G. Logan, acting for Josiah Marvel, attorney for Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla, three of the defendants herein, and Robert B. Walls, guardian ad [fol. 136] litem for Dorothy B. R. Stewart, William Donner Denckla and Curtin Winsor, Jr., three of the defendants herein, having appeared in opposition to said application, and Arthur G. Logan, attorney as aforesaid, having advised the Court that he proposes to take depositions or file affidavits in opposition to said motion for summary judgment, and it appearing to the Court that it is desirable to defer the fixing of a date for a hearing on the aforesaid motion for summary judgment until after a reasonable opportunity has been given all parties to file in opposition to said motion for summary judgment such affidavits, depositions and other appropriate documents as they deem necessary for the effective resistance of said motion, and it appearing to the Court that pursuant to the order of the Court dated September 27, 1954 a special appearance has heretofore been entered on behalf of the defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla for the purpose of moving to dismiss the above action.

IT IS ORDERED by the Chancellor as follows:

1. That all of the parties to the above action may file on or before January 7, 1955 such affidavits, depositions or other appropriate documents as they deem necessary or desirable to oppose the motion for summary judgment filed by Edwin D. Steel, Jr., guardian ad litem for Joseph Donner Winsor and Donner Hanson; and

2. That the filing of any affidavits, depositions or other appropriate documents by the defendants Dora Stewart

Lewis, Mary Washington Stewart Borie and Paula Browning Donner for the purpose of opposing said motion for summary judgment shall not be deemed to change the character of the appearance previously entered on their behalf pursuant to the order of this Court dated September [fol. 137] 27, 1954.

s/ Collins J. Seitz
Chancellor

APPROVED AS TO FORM:

s/ Josiah Marvel by A.G.L.
Appearing specially for Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla

s/ C. S. Layton
Attorney for Wilmington Trust Company Trustee

s/ David F. Anderson
Attorney for Delaware Trust Company Trustee

s/ R. B. Walls, Jr.
Guardian ad litem for Dorothy B. R. Stewart, William Donner Denckla and Curtin Winsor, Jr.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,
NEW CASTLE COUNTY, *ss.*:

I, ROBERT A. STEVENSON, Register of the Court of Chancery of the State of Delaware, in and for New Castle County, do hereby certify that the foregoing is a true and correct copy of the ORDER signed by the Chancellor of the State of Delaware on the 2nd day of December, A. D. 1954. In the matter of ELIZABETH DONNER HANSON v. WILMINGTON TRUST COMPANY, et al., C. A. No. 531, as the same is on file and remains of record in this Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said Court at Wilmington, this 2nd day of December, A. D. 1954.

/s/ Robert A. Stevenson
Register in Chancery

(Court of Chancery Seal)

[fol. 138] CLERK'S NOTE

On the 5th day of January, 1955, Appearance of Edward McCarthy as associate counsel for the defendant Elizabeth Donner Hanson, as Guardian ad litem for the minor defendants, Joseph Donner Winsor and Donner Hanson, was filed before Judge C. E. Chillingworth.

IN CIRCUIT COURT OF FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

SUMMARY FINAL DECREE—January 14, 1955

This cause was duly presented by counsel for the parties upon Motion for Summary Final Decree filed by plaintiff November 19, 1954 and Motion for Summary Decree filed by certain defendants on December 3, 1954.

Only questions of law are presented. The facts are simple and undisputed. No useful purpose would be served in stating them.

Two principal questions are presented, first, jurisdiction as against those whom a decree pro confesso has been entered; secondly, the authority of an executrix of a Florida will concerning certain assets now located in Delaware and purported to be held under a declaration of trust and power of appointment executed by the testator.

As to jurisdiction, the trust assets and the trustee are in Delaware. No personal service has been had upon the defendants who failed to answer. The inclusion of the trust assets in her inventory, and an allowance of counsel fees and compensation for the executrix, although such an inclusion was later sought to be withdrawn, does not

[fol. 139] of itself give this court jurisdiction over those assets in Delaware or the Trustees. Hence, this court considers that it has no jurisdiction over the non-answering defendants.

Concerning the declaration of trust dated March 25, 1935, and particularly the power of appointment dated December 3, 1949, no present interest passed to any beneficiary other than the Trustor (Testatrix). It seems clear to me, from the authorities, that the power of appointment was testamentary in character and did not constitute a valid inter vivos trust appointment. As the appointment had only one subscribing witness, rather than two, as required in Florida, it did not constitute a valid testamentary disposition. Hence, the executrix should receive the assets and dispose of them agreeable to the will under which she was appointed.

THEREUPON, IT IS ORDERED that this cause be dismissed, without prejudice, as to the non-answering defendants; that the Motion filed February 18, 1954, and the Motions for Summary Final Decree be granted to the extent embraced in this decree, and in other respects denied.

IT IS FURTHER ORDERED AND DECREED that, as to the parties now before the court, the assets held under the provisions of the trust agreement dated March 25, 1935, between the decedent, Dora Browning Donner, and Wilmington Trust Company, as Trustee, and additions thereto, passed under the will of Dora Browning Donner, dated December 3, 1949, and disposition thereof is determined by the residuary clause of the will, which was admitted to probate in the County Judge's Court, in Palm Beach County, December 23, 1952.

IT IS FURTHER ORDERED that this court retain jurisdiction for the purpose of enforcing this decree and the settlement of any other questions that may properly arise in connection herewith, all with costs taxed against the executrix.

[fol. 140] Copy furnished counsel.

DONE AND ORDERED this 14 day of January, A. D. 1955.

C. E. Chillingworth
Circuit Judge

IN CIRCUIT COURT OF FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

PETITION FOR REHEARING—Filed February 1, 1955.

Come now the answering defendants by their undersigned attorneys and petition for a rehearing and reconsideration of the decree entered herein January 14, 1955, upon the following grounds:

1. While this Court correctly held that it had no jurisdiction over the nonresident defendants, it did not, in its opinion dated January 14, 1955, consider the fact that, under decided authorities, the nonresident trustees and nonresident appointees are indispensable parties, without whose presence this Court cannot give final effectual relief. See *McArthur* v. *Scott* (1884), 113 U. S. 340; *Winn* v. *Strickland* (1894), 34 Fla. 610; *Wilson* v. *Russ* (1880), 17 Fla. 691.

The general rule is stated in 34 Am. Jur. 458:

> "Ordinarily, the trustee should and *must* be made a party to a suit to terminate or set aside a trust * * * (Italics added.)

In *Sadler* v. *Industrial Trust Company* (Mass. 1951), 97 N. E. 2d 169, the Supreme Judicial Court of Massachusetts dismissed a suit where both the trust res and the Trustee were outside that State even though *all* the beneficiaries of the trust were in the State and properly before the Court. The *Sadler* case is an exact authority and is highly persuasive in demonstrating that the Trustee must be before [fol. 141] the Court for any effectual decree to be rendered. The Court stated:

> "In our opinion, the trustee is an indispensable party to any adjudication of the life beneficiaries' interests under the trust. Justice requires that the trustee be a party, lest it raise the same question, for example, in an accounting with the same parties at a later date. * * * The Judge was right in dismissing the suits.

"No jurisdiction to enter a decree in personam against the trustee was acquired by service by registered mail and publication. (Citing *Pennoyer v. Neff*, supra)."

In *Findlay* v. *F. E. C. Railway Company* (D. C. Fla. 1933), 2 F. Supp. 393, aff'd (C. C. A. 5), 68 F. 2d 540, our District Court held that no binding decree could be rendered where the Court could not direct the conduct of non-resident Trustees, saying:

"The first matter to be determined, therefore, is whether or not there is a res within the jurisdiction of this court upon which a decree in rem may be imposed, that is, whether the situs of the trust estate, which is the subject matter of this suit, is in this judicial district so as to empower this court to construe the will and deal with the trust estate according to this court's interpretation of the will, as sought by plaintiff.

* * * * * * *

"This court is without power to construe the will, or to adjudicate by a decree in rem the rights, if any, of the railway company in the trust estate, as against these nonresident defendants, or against other nonresident beneficiaries under the will."

"Even if the residual estate is an equitable asset of the railway company, and even if plaintiffs' bonds, through the trust deed, are a lien upon it, *there is no res in this jurisdiction, there is no basis upon which this court may properly direct the conduct of the nonresident trustees with respect to the trust estate. Any attempt to do so would be a pure usurpation of power.*" (Italics added.)

This Court has properly held that neither the Delaware Trust Company nor Wilmington Trust Company is subject to its jurisdiction. Since they are indispensable parties, no effectual decree can be rendered by this Court.

Furthermore, none of the other appointees under the Trust have appeared and, as this Court stated in its opinion, [fol. 142] the Court has no jurisdiction as to them. But

the non-answering appointees are also indispensable parties. As stated in *Gulda* v. *Second Nat. Bank* (Mass. 1948), 90 N. E. 2d., 15 A. L. R. 2d. 605, where the Trustee was subject to the jurisdiction, but all the beneficiaries were not:

> "In the instant case, however, the very existence of the trust itself * * * is threatened by the plaintiff, and those named as beneficiaries in the said declaration may be adversely and directly affected by the decree which may be entered. Their interests in the property are opposed to those asserted by the plaintiff. They are entitled to be heard in order to protect their rights and should not be compelled to depend on the defense made by the trustee."

This quotation demonstrated that where the validity of a trust is questioned, all interested persons, including both the Trustee and the beneficiaries are indispensable to the suit. The absence of numerous individual appointees, whose interest in the Trust amounts to approximately $17,000, and of the Trustees, as well as possible undisclosed beneficiaries of the trusts of which Delaware Trust Company is Trustee, all of whom are indispensable parties, must necessarily prevent this Court from finally and effectually determining this litigation.

2. This Court erred in holding that no present interest passed to any beneficiary other than the Trustor. Plaintiffs correctly state the basic law covering the operation and effectiveness of a power of appointment as follows:

> "A power of appointment relates back to the original trust instrument and the donee takes under the authority of the power as if the power and the instrument executing the power had been incorporated in one instrument." (Plaintiffs' Brief, p. 17a.)

See also *Wilmington Trust Co.* v. *Wilmington Trust Co.* (Del. 1942), 24 A 2d 309, 139 A. L. R. 1117; *Lederer* v. *Safe Deposit & Trust Co. of Baltimore* (Md. 1943), 35 [fol. 143] A. 2d 166. Therefore, on December 3, 1949, when Mrs. Donner exercised her reserved power, the appointees named in that instrument took vested interests in the

trust corpus created by the trust instrument of March 25, 1935. The fact that these interests might be divested by the exercise of a condition subsequent, namely, the Trustor's right to revoke, alter or amend, is immaterial. This is simply an application of the indisputable rule that the law favors the early vesting of estates. As stated by our Supreme Court in *Story* v. *First National Bank & Trust Co.* (1934), 115 Fla. 436, 156 So. 101:

> "The law favors the early vesting of estates and in the absence of a clear intention of the testator to the contrary, estates are held to vest at the earliest possible date." See also Krissoff v. First National Bank (1947), 159 Fla. 522, 32 So. 2d 315.

The Restatement of Trusts, Paragraph (g) of the Comment under Section 56 makes this crystal clear.

> "g. *Beneficiary ascertainable from non-testamentary act.*
>
> "If the owner of property transfers it to another person in trust for such person as may be subsequently ascertained by a fact which is not a testamentary act, the requirements of the Statute of Wills need not be complied with. An act is not testamentary if an interest passes thereby to the beneficiary during the life of the settlor (see § 57) or if the act has significance apart from its effect upon the disposition of the interest (see § 54, Comment c).
>
> *Illustration*:
>
> 8. A transfers certain securities to B in trust to pay the income to A for life and upon A's death to convey the securities to such person as may be designated in a letter to be delivered by A to B on the following day. On the following day A delivers a letter to B designating C as the person entitled to receive the securities on A's death. A valid trust for C is created, since an interest passes to C during the life of A."

The frequently cited case of *Leahy* v. *Old Colony Trust Co.* (Mass. 1950), 93 N. E. 238 supports this proposition.

[fol. 144] In that case the Supreme Judicial Court of Massachusetts stated:

> "In this case it is not true that 'no interest' pass to any beneficiary other than Jennie M. Luhrs before her death, for the interest of all the beneficiaries vested at the creation of the trust, subject to being divested by the exercise of the reserved power to amend or revoke the indenture of trust. The reservation of that power did not make the trust testamentary."

See also *United B. & L. Association* v. *Garrett* (1946) 62 F. Supp. 460.

And our own Supreme Court commented in *Williams* v. *Collier* (1935), 120 Fla. 248, 158 So. 815:

> "Whether the trust deed be regarded as creating or as declaring a trust, the dominant interest of the trustor as shown by the entire instrument was to make *a completed gift* of the principal of the bonds to his designated grandchildren. The reservation of the interest to accrue from the bonds did not affect the perfected gift of the principal. 65 C. J. 273. The other reservations were in effect a power relating to the custody and administration of the perfected trust fund." (Italics added.)

Since the plaintiffs admit and all the authorities support the proposition that the exercise of a reserved power of appointment fills in the blanks of the trust instrument, the conclusion is inescapable that the appointees named in the 1949 appointment took vested interests during Mrs. Donner's lifetime.

3. Assuming without admitting that the 1949 appointment required but lacked testamentary formalities, nevertheless, the trust agreement and the appointments are ratified, confirmed, and incorporated by reference into the Last Will and Testament of Dora Browning Donner, dated December 3, 1949. On the same day, December 3, 1949, when she appointed $417,000 to the Bryn Mawr Hospital, her servants, and the Delaware Trust Company, as Trustee

for her two grandchildren, Dora Browning Donner executed her Will. In Paragraph 5 of her Will, she leaves [fol. 145] all her residuary estate to her Executrix and in Paragraph (a) she directs her Executrix:

> "(a) Thereout to pay all estate, inheritance, transfer, or other succession taxes or death duties, State and Federal, which by reason of my death shall become payable upon or with respect to the *property appointed by me by exercise of the power of appointment provided in my favor in Paragraph 1 of a certain trust agreement* entered into between me and Wilmington Trust Company, a Delaware corporation, as trustee on the 25th day of March, 1935." (Italics added.)

In Paragraph (b) of the Appointment of that date she directs the Wilmington Trust Company in turn:

> "(b) As soon as conveniently may be, to pay the residue of the principal and undistributed income of the said trust fund held by it under the Trust Agreement to the Executrix of my Last Will and Testament to be dealt with by her in accordance with the terms and conditions of my said Last Will and Testament and any Codicil thereto."

It follows, therefore, that Mrs. Donner, in her Will, recognized the trust agreement as an integral factor in the disposition of her property by directing her Executrix to pay taxes on the property appointed under the power. The two instruments must, consequently, be read together in order to give full affect to the intent of the Testatrix. This proposition is wholly supported by the case of *McHardy* v. *McHardy* (1857), 7 Fla. 301. In that case the decedent transferred all his property to a Trustee in trust for the payment of all his debts. His Will, made on the same day, declared his Last Will and Testament to be subject to the assignment in trust. In holding that the trust was validly incorporated into the Will, the Court said:

> "Although the assignment might be objectionable about which it is not necessary to express an opinion,

> this interpolation of its leading provision in the will adopts it and makes it a part of it, as if it were fully and entirely written out in the will. If a testator in his will refers expressly to any paper already written and has so described it that there can be no doubt of the identity, that paper, whether executed or not, makes part of the will, and such reference is the same as if he had incorporated it. *Habergham* v. *Vincent*, 2 Vessey, 228.

[fol. 146] This is an expression of the law as it exists today. The annotation in 21 A. L. R. 2d 221 states that a will duly executed and witnessed "may incorporate into itself, by appropriate reference, intent and identification, an existing written paper or document whether or not executed as a will or signed by the testator, and whether or not it has any validity in itself." The same annotation comments further that the "doctrine has been applied to wills incorporating by reference the terms of existing trusts." From the language used by Dora Browning Donner in her Last Will and Testament, it is apparent that she incorporated the March 25, 1935 trust agreement and subsequent appointments thereunder into her Will. Therefore, even if the original trust agreement and the appointments executed pursuant thereto are held to be testamentary, the fact that they were not executed in compliance with the Statute of Wills is of no importance since a nontestamentary document may be incorporated into a Will by reference.

4. Finally, we direct the Court's attention to the following compelling grounds, any one of which would give validity to the agreement of March 25, 1935 as an inter vivos trust:

> (a) The form and execution of the agreement were accomplished with all of the formalities required for a valid contract. The protection of the Statute of Wills was not required.
>
> (b) Legal title to the trust property passed to the Trustee with vested remainders in the appointees subject to Trustor's right to the income for life.

(c) Control over the trust property was at all times lodged in the trustee in conjunction with the investment adviser.

[fol. 147] (d) The dominant intent of the Trustor, evidenced not only by the agreement but reaffirmed by her Will and every living act, was to create a valid Trust.

We submit that the Court has the duty to recognize and give effect to the dominant and undisputed intent and wishes of the Trustor in disposing of her property.

Wherefore, aforesaid defendants move this Court for reconsideration of this case on rehearing and for modification of the judgment upon such rehearing.

Respectfully submitted,

/s/ Edward McCarthy
/s/ Manley P. Caldwell
Attorneys for Defendants aforesaid.

/s/ Wm. H. Foulk
Of Counsel

IN CIRCUIT COURT OF FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

MOTION TO STRIKE—Filed February 17, 1955

The plaintiffs move the Court to strike the Petition for Rehearing filed by certain defendants herein on February 1, 1955, upon the grounds:

1. It is not in the form provided by law.

2. It violates the rules of pleading and practice.

3. Its effect is simply and solely to take issue with the correctness of Court's conclusions evidenced by the decree of January 14, 1955.

C. ROBERT BURNS
REDFEARN & FERRELL

By: /s/ C. Robert Burns
Attorneys for Plaintiffs.

[fol. 148] In Circuit Court of Fifteenth Judicial Circuit in and for Palm Beach County, Florida

Order—March 3, 1955

This cause was duly presented by counsel after notice, and upon consideration thereof.

It is Ordered and Adjudged that the plaintiffs' motion to strike, filed February 17, 1955 be denied, and the petition for rehearing, filed February 1, 1955 be denied.

Copy furnished counsel.

Done and Ordered this March 3, A. D. 1955.

C. E. Chillingworth, Circuit Judge.

In the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida

In Chancery, No. 31,980

Katherine N. R. Denckla, individually, and Elwyn L. Middleton, as guardian of the property of Dorothy Browning Stewart, also known as Dorothy B. Stewart and Dorothy B. Rodgers Stewart, an incompetent person,

Plaintiffs,

v.

[fol. 149] Elizabeth Donner Hanson, individually, as Executrix of the Will of Dora Browning Donner, Deceased, and as Guardian ad litem for Joseph Donner Winsor and Donner Hanson, William Donner Roosevelt, individually, et al.

Defendants.

Notice of Appeal—Filed March 11, 1955

The defendants, Elizabeth Donner Hanson, individually, as Executrix of the Will of Dora Browning Donner, Deceased, and as Guardian ad litem for Joseph Donner Winsor and Donner Hanson, and William Donner Roosevelt, individually, take and enter their appeal to the Supreme Court of Florida to review the final Decree of the Circuit Court

of Palm Beach County, Florida, bearing date the 14th day of January, 1955, entered in the above styled cause and recorded in the records of said Court in Chancery Order Book 234, page 632, and all parties to said cause are called upon to take notice of the entry of this appeal.

Caldwell, Pacetti, Robinson & Foster, /s/ Manley P. Caldwell, Harvey Building, West Palm Beach, Florida, Attorneys for aforesaid Defendants.

McCarthy, Lane & Adams, /s/ Edward McCarthy, Atlantic National Bank Building, Jacksonville, Florida, Attorneys for Elizabeth Donner Hanson as Guardian ad litem for Joseph Donner Winsor and Donner Hanson.

/s/ William H. Foulk, Delaware Trust Building, Wilmington, Delaware, Of Counsel.

[fol. 150] CLERK'S CERTIFICATE to foregoing paper (omitted in printing).

IN CIRCUIT COURT OF FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

ASSIGNMENTS OF ERROR AND DIRECTIONS TO CLERK— Filed March 21, 1955

Come now the Defendants Appellants, Elizabeth Donner Hanson, individually, as Executrix of the Will of Dora Browning Donner, Deceased, and as Guardian ad litem for Joseph Donner Winsor and Donner Hanson, and William Donner Roosevelt, individually, and files these their Assignments of Error and Directions to the Clerk relating to their Notice of Appeal entered herein March 11, 1955.

ASSIGNMENTS OF ERROR

1. The Court erred in entering the summary final decree herein dated January 14, 1955.

2. The Court erred in entertaining jurisdiction of this suit, although the Court does not have jurisdiction of the res nor of indispensable parties.

3. The Court erred in not dismissing this suit for lack of jurisdiction.

4. The Court erred in decreeing that the assets involved herein passed under the Will of Dora Browning Donner and that disposition thereof is determined by the residuary clause of said Will.

[fol. 151] 5. The Court erred in not decreeing that the Trust Agreement and exercises of powers of appointment involved herein are valid and effective and that the assets involved herein are not affected by the Will of Dora Browning Donner and did not become a part of the residuary estate of said Decedent.

6. The Court erred in denying petition for rehearing on March 3, 1955.

DIRECTIONS TO CLERK

In the preparation of the transcript of record in this cause, the Clerk of the above styled Court will please follow these directions:

1. Omit all certificates of service and certificates on copies.

2. Copy bill of complaint filed January 22, 1955, with accompanying exhibits.

3. Recite personal service of process January 29, 1954, on Elizabeth Donner Hanson, individually, and as Executrix of the Will of Dora Browning Donner, Deceased, and on Joseph Donner Winsor, Donner Hanson and William Donner Roosevelt.

4. Copy notice of suit filed January 22, 1954.

5. Recite proof of publication of notice of suit in Palm Beach Times on January 23, 30, February 6, 13, 1954.

6. Copy order appointing guardian ad litem, filed February 16, 1954.

7. Copy motion of Elizabeth Donner Hanson, etc., filed February 18, 1954.

8. Copy decree pro confesso, filed March 4, 1954.

9. Copy order appointing guardian ad litem, filed March 8, 1954.

[fol. 152] 10. Copy order filed April 9, 1954.

11. Copy Court Reporter's transcript, filed April 9, 1954.

12. Copy order of Supreme Court of Florida, filed July 1, 1954.

13. Copy answer of Elizabeth Donner Hanson, etc., filed August 3, 1954, and copy of Delaware complaint attached to it, but omitting the copies of exhibits attached to the Delaware complaint.

14. Copy motion to stay of Elizabeth Donner Hanson, etc., filed August 3, 1954.

15. Copy application for injunction and other relief, filed August 16, 1954.

16. Copy reply to application for injunction, filed August 20, 1954, and the exhibits attached thereto.

17. Copy answer of Wilbur E. Cook as Guardian ad litem, filed August 25, 1954.

18. Copy order discharging Wilbur Cook as Guardian ad litem, filed August 25, 1954.

19. Copy injunctive order and order on motions to stay, filed August 25, 1954.

20. Copy motion for summary final decree, filed November 19, 1954.

21. Copy answer of Paula Browning Denckla, filed November 22, 1954.

22. Copy corrected order of Supreme Court of Florida, filed November 26, 1954.

23. Copy motion of certain defendants for summary final decree filed December 23, 1954, and the exhibits attached thereto.

24. Copy certified copy of order of Court of Chancery of New Castle County, Delaware, filed December 7, 1954.

[fol. 153] 25. Recite appearance of Edward McCarthy as associate counsel for Elizabeth Donner Hanson, as Guardian ad litem, filed January 5, 1955.

26. Copy summary final decree, filed January 14, 1955.

27. Copy petition for rehearing, filed February 1, 1955.

28. Copy motion to strike, filed February 17, 1955.

29. Copy order denying petition for rehearing, filed March 3, 1955.

30. Copy notice of appeal, filed March 11, 1955.

31. Copy these assignments of error and directions to clerk, filed March 21, 1955.

Caldwell, Pacetti, Robinson & Foster, Attorneys for aforesaid Defendants-Appellants.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 154] IN CIRCUIT COURT OF FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CROSS ASSIGNMENT OF ERROR—Filed March 28, 1955

Come now the appellees, Katherine N. R. Denckla, individually, and Elwyn L. Middleton, as guardian of the property of Dorothy Browning Stewart, also known as Dorothy B. Stewart and Dorothy B. Rodgers Stewart, an incompetent person, and file this their assignment of error relating to the notice of appeal filed herein on March 11, 1955.

1. The Court erred in its summary final decree dated January 14, 1955, in holding that it had no jurisdiction over the non-answering defendants.

ADDITIONAL DIRECTIONS TO THE CLERK

1. Copy this cross assignment of error and additional directions to the Clerk.

C. Robert Burns, Redfearn & Ferrell, By: C. Robert Burns, Attorneys for aforesaid Appellees.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 155] CLERK'S CERTIFICATE to foregoing transcript (omitted in printing).

[fol. 157] IN THE SUPREME COURT OF THE STATE OF FLORIDA

ELIZABETH DONNER HANSON, Individually, and as Executrix of Will of Dora Browning Donner Deceased and as Guardian ad litem for DONNER HANSON and JOSEPH DONNER WINSOR, and WILLIAM DONNER ROOSEVELT, Individually,

Petitioners,

v.

KATHERINE N. R. DENCKLA, Individually, and ELWYN L. MIDDLETON, as Guardian of the Property of DOROTHY BROWNING STEWART, also known as Dorothy B. Stewart and Dorothy B. Rodgers Stewart, an incompetent person,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO REVIEW INTERLOCUTORY ORDER IN CHANCERY—Filed May 14, 1954

To Honorable Justices of the Supreme Court of Florida:

Your Petitioners, Elizabeth Donner Hanson, Individually, and as Executrix of Will of Dora Browning Donner, Deceased and as Guardian ad litem for Donner Hanson and Joseph Donner Winsor, and William Donner Roosevelt, Individually, respectfully show unto the Court as follows:

1. On January 22, 1954 Respondents Katherine N. R. Denckla, individually and Elwyn L. Middleton, as Guardian of the property of Dorothy Browning Stewart, also known as Dorothy B. Stewart and Dorothy B. Rodgers Stewart, an incompetent person, hereinafter called Respondents, filed in the Circuit Court for Palm Beach County, Florida, bill of complaint for a Declaratory Decree. Named as Defendants were Elizabeth Donner Hanson, individually and as Executrix of the Will of Dora Browning Donner, Deceased, and her children, Donner Hanson, Joseph Donner Winsor and William Donner Roosevelt, Wilmington Trust Company, a Delaware corporation, Delaware Trust Company, a Delaware corporation, and a number of other Defendants. (R. 1).

[fol. 158] 2. The bill of complaint seeks the construction of certain powers of appointment executed by Dora Browning Donner, pursuant to authority reserved by her in a revokable trust, which she created under date of March 25, 1935, with Wilmington Trust Company, Wilmington, Delaware, as Trustee. In the exercise of these powers she appointed $200,000 to each of two trusts created by Elizabeth Donner Hanson with Delaware Trust Company, Wilmington, Delaware, as trustee, and $17,000 to individual beneficiaries.

Distributions were made by Wilmington Trust Company, as Trustee, to the appointees within 12 months after the date of donor's death, on November 20, 1952, in accordance with the requirement of the appointment. At the date of death of the donor and the date of the commencement of this suit the $417,000 were held outside the State of Florida by the Trustee and other appointees, none of whom were residents of or found within the State of Florida. (R. 48).

The bill of complaint asks for a declaration that the powers of appointment were invalid.

3. Personal service of process was obtained upon Elizabeth Donner Hanson, individually and as Executrix of aforesaid Will, Donner Hanson, Joseph Donner Winsor and William Donner Roosevelt. (R. 44). On February 16, 1954, Elizabeth Donner Hanson was appointed Guardian ad litem for her minor children, Donner Hanson and Joseph Donner Winsor. (R. 46).

Service by publication was sought upon the remaining Defendants, including Wilmington Trust Company and Delaware Trust Company. (R. 44, 47). None of the Defendants served by publication appeared nor filed defenses herein and decrees pro confesso were entered against them for failure to do so. (R. 51, 52).

4. On February 18, 1954 Elizabeth Donner Hanson, individually, as Executrix of the Will of Dora Browning Donner, Deceased and as Guardian ad litem for Donner Hanson and Joseph Donner Winsor, and William Donner Roosevelt, individually, who are hereinafter called Petitioners, filed sworn motion for dismissal of this suit, based upon grounds 1, 2, 4, 5 and 7 of Equity Rule 33(b). (R. 47).

[fol. 159] This motion asserted that the Court lacks jurisdiction of the subject matter of this suit, because there is no res in the State of Florida which would afford a basis for constructive service upon the Defendants sought to be served by publication, particularly Wilmington Trust Company and Delaware Trust Company, in whose possession in Wilmington, Delaware the assets involved in the suit were located at the time of the death of the decedent and principally at the time of the institution of the suit, respectively; that the Executrix has never had any possession of said assets; and that Petitioners were informed and believed that the Defendants sought to be served with constructive service would not submit themselves to the jurisdiction of this Court.

Petitioners asserted that the exercise by the Court of the jurisdiction sought to be invoked by Respondents would contravene the Constitution and Laws of the State of Florida and the Constitution of the United States, and in particular Section 1 of the Fourteenth Amendment to the United States Constitution.

The motion also asserted that the Court lacks jurisdiction over the person of indispensable parties; that the purported process directed to indispensable parties is insufficient; that the purported service of process upon indispensable parties is insufficient and that Respondents failed to join indispensable parties by valid and legal process; all for the reasons set forth in detail under the first ground of the motion.

5. On March 16, 1954 Respondents served notice of calling up for hearing all undisposed of motions, which operated as an application for determination before trial of such motion. (R. 54). The motion came on for hearing before the Court on April 6, 1954. (R. 59). No counter affidavits, nor evidence in opposition to the above sworn motion, were presented at the hearing.

6. On April 9, 1954 the Court entered order holding that though the suit is primarily concerned with the validity and effect of certain powers of appointment rather than the will of aforesaid Decedent, it considered that the matters sought to be presented by aforesaid motion can best be determined

at final hearing. Accordingly, ruling upon this motion was postponed until trial and final hearing. (R. 55).
[fol. 160] This order was stayed and superseded on April 23, 1954, pending these certiorari proceedings. (R. 66).

7. A certified transcript of the record of the pertinent proceedings in said cause is presented herewith, and made a part hereof.

8. Petitioners would further show unto the Court that they are greatly aggrieved by aforesaid order of the Circuit Court of April 9, 1954, postponing ruling upon aforesaid motion until trial and final hearing, and this Court should issue a writ of certiorari to review and reverse said order and correct the errors of said Court in entering said order for the reason that said order was not entered pursuant or in accordance with the essential requirements of law in the following respects:

(a) The Court should have granted said motion and should not have postponed ruling thereon until trial and final hearing and it abused its discretion in so postponing ruling thereon. By so postponing ruling on the jurisdictional question the Court has subjected Petitioners, Respondents and the Estate of Dora Browning Donner to the incurring of substantial expenses for attorneys' fees and costs in preparation of the case for trial on the merits and its trial, which would be unnecessary if it is held that the Court does not have jurisdiction in this suit.

(b) The motion should have been granted because it indisputably appears from the record herein that the grounds upon which said motion is based are valid and controlling; that the Court does not have jurisdiction of the subject matter of this cause nor does it have jurisdiction of indispensable parties hereto in that the assets which are the subject matter of this suit are not situated in Florida either physically nor constructively, nor have any of the parties holding said assets been personally served, nor have they submitted themselves to the jurisdiction of this Court.

Wherefore, the premises considered, Petitioners pray that this Honorable Court will grant to them a writ of

certiorari directed to and commanding the Clerk of the Circuit Court of Palm Beach County, Florida to transmit and certify to this Court the record and proceedings of said Court in said cause, including all pleadings and orders hereinabove referred to, and that this Honorable Court will [fol. 161] thereupon proceed to review the same and determine that the order entered April 9, 1954 is erroneous and void for the reasons pointed out, and that this Honorable Court will quash and set aside said order and direct the said Circuit Court to revoke and vacate said order and to grant Petitioners' motion and dismiss this suit, and that this Court shall grant unto Petitioners such other and further relief as to this Court may seem fit and proper.

/s/ Wideman, Caldwell, Pacetti & Robinson, /s/ Manley P. Caldwell, /s/ Madison F. Pacetti, 501 Harvey Building, West Palm Beach, Florida, Attorneys for aforesaid Petitioners.

[fol. 162] *Duly sworn to by Manley P. Caldwell, jurat omitted in printing.*

[fol. 164] IN THE SUPREME COURT OF THE STATE OF FLORIDA

[Title omitted]

PETITION FOR REHEARING—Filed July 13, 1954

Come now, the Petitioners, Elizabeth Donner Hanson, etc., et al., by their undersigned attorneys, and as their Petition for Rehearing respectfully show unto the Court the following:

1. In the order of this Court entered herein June 29, 1954, denying the petition for writ of certiorari, this Court did not assign any reason for denying said petition. It is respectfully submitted that in view of the important jurisdictional question presented it would be helpful to the parties, counsel and the lower court, if the views of this Court on the points presented herein be set forth in an opinion on rehearing.

2. In denying the petition the Court overlooked its ruling in *Bohlinger* v. *Higginbottom* (April 1954) 70 So. 2d 913 (cited on page 4 of Petitioners' Reply Memorandum), wherein it was held "Courts are bound to take notice of the limits of their authority and if want of jurisdiction appears *at any stage of the proceedings* * * * the Court should notice the defect and enter an appropriate order." (Italics supplied).

It appears from the record herein that there is want of jurisdiction of the res and of the indispensable party holding the res, Delaware Trust Company. Accordingly, it is appropriate that this Court notice this defect and enter an order directing dismissal of the suit.

[fol. 165] 3. In postponing decision of the jurisdictional question the Circuit Judge failed to follow the emphasis of Equity Rule 33(d) and has imposed upon the parties and the Estate of the Decedent, Dora B. Donner, the heavy expense attendant upon preparation of this case for trial, and its trial. In so doing he failed to exercise sound, judicial discretion and therefore the order of postponement should have been quashed.

Reference is made to the argument of this point in Petitioners' Brief, pages 12 through 21, and the authorities therein cited. It is urged that this Court reread that portion of the Brief, which demonstrates that the exercise of sound, judicial discretion should result in the settlement of the jurisdictional question herein involved, at the outset of this case and not in the later stages thereof.

4. It clearly appears from the record that the Circuit Court does not have jurisdiction of this suit, nor of essential parties hereto. The assets of the Trust involved are neither physically nor constructively in Florida. They are held by Delaware Trust Company, a foreign corporation, which has not been personally served nor has it appeared herein. If the Court should proceed to final decree upon the merits in favor of Respondents, such decree would not be enforceable in Florida, because it could not be enforced against this indispensable party. To enforce the decree suit would be necessary in Delaware and, absent Florida jurisdiction, the decree would not be entitled to full faith and

credit. Relitigation would necessarily follow in Delaware. It is far better that the question be determined in the appropriate Court in Delaware, where the property is physically located, has its situs and where personal service of process can be obtained on the indispensable Trustee.

Reference is made to the argument on this point in pages 22 through 37 of Petitioners' Brief, and to the controlling authorities therein cited. It is urged that the Court reread this portion of the Brief, which demonstrates the utter lack of jurisdiction of the Circuit Court herein.

[fol. 166] Under these circumstances it is futile for the Circuit Court to be permitted to proceed with the case. The order postponing determination of the jurisdictional question should be quashed, with directions to decide this question for Petitioners by dismissal of the suit for lack of jurisdiction.

Wherefore, Petitioners move the Court for reconsideration of this case on rehearing on the points and issues set forth in this petition for rehearing, and for the quashing of aforesaid order, upon such rehearing.

Respectfully submitted,

/s/ Wideman, Caldwell, Pacetti & Robinson,
/s/ Manley P. Caldwell, Attorneys for Petitioners.

Certificate of Service (omitted in printing).

[fol. 168] In the Supreme Court of the State of Florida

[Title omitted]

Second Petition for Writ of Certiorari to Review Interlocutory Order in Chancery—Filed September 28, 1954

To Honorable Justices of the Supreme Court of Florida:

Your Petitioners, Elizabeth Donner Hanson, Individually, and as Executrix of Will of Dora Browning Donner, Deceased and as Guardian ad litem for Donner Hanson and Joseph Donner Winsor, and William Donner Roosevelt, Individually, respectfully show unto the Court as follows:

1. This is the second petition for writ of certiorari to be filed in this Court in the above cause. The first petition was filed on May 14, 1954, seeking to review the interlocutory order of the Circuit Court of Palm Beach County entered April 9, 1954, postponing until final hearing ruling on the jurisdictional questions which the Petitioners had presented. By stipulation between counsel for the Petitioners and the Respondents filed herein September 2, 1954, it has been agreed that the record and briefs in the aforesaid first certiorari proceedings may be used in these proceedings insofar as they may be applicable to the same extent as if the same had been originally filed in the second proceedings.

[fol. 169] Accordingly, analysis of the proceedings in this case through said order of April 9, 1954, are not repeated in this petition, but reference is made to the petition in the first proceedings to the same extent as if the facts stated in said first petition were set out herein at length.

2. On June 29, 1954, this Court denied aforesaid petition. Petitioners, on July 13, 1954, filed herein petition for rehearing on said order, which petition for rehearing was denied by this Court on July 16, 1954.

3. A certified transcript of the record of the pertinent proceedings in said cause subsequent to the return thereof to the Circuit Court following the first certiorari proceedings has been filed herein, and is made a part of this petition. References herein to said transcript will be made as "2nd R.-" to distinguish the paging in said second transcript from the paging in the first transcript referred to in the first certiorari proceedings as "R.-".

On August 3, 1954 these Petitioners filed their answer to the bill of complaint herein (2nd R.-1), the presently material portions of which may be summarized as follows.

In Paragraph 11 of the answer (2nd R.-8) Petitioners aver that Elizabeth Donner Hanson as Executrix and Trustee; intending to meet Respondents' charge that she has failed to take steps to "capture" assets belonging to said Estate, and in order to expedite the final determination of the controversy raised by Respondents, on July 28, 1954 filed in the Court of Chancery of New Castle County, Dela-

ware, a complaint for declaratory judgment against Wilmington Trust Company as Trustee, Delaware Trust Company as Trustee, the Respondents herein and others, seeking determination as to the persons entitled to participate in the assets held in trust by Wilmington Trust Company under the Trust Agreement involved herein. Copy of said Delaware complaint was attached to the answer and made a part thereof (2nd R.-11).

Petitioners prayed that the Florida suit be stayed pending determination of the Delaware suit.

[fol. 170] 4. Concurrently with the filing of the answer Petitioners filed a separate motion to stay, setting up the pendency of the Delaware suit and moving for a stay of the Florida suit. (2nd R.-22).

5. On August 16, 1954 Respondents, the Plaintiffs in the court below, filed an application for injunction and other relief, alleging, with material inaccuracies, previous pleadings and orders in the suit, including the allegations in the answer concerning the pendency of the Delaware suit. They prayed for an injunction against Elizabeth Donner Hanson, Individually, as Executrix and as Trustee, enjoining her from further proceedings in the Delaware suit. (2nd R.-24).

6. On August 20, 1954, Petitioners filed a reply to said injunction application, correcting inacourate allegations in said application. (2nd R.-30).

7. On August 25, 1954, after argument of aforesaid motion to stay and application for injunction, the Chancellor entered order denying the motion to stay and enjoining Mrs. Hanson from further prosecuting the Delaware suit until the further order of said Court. (2nd R.-56).

This order was stayed and superseded on September 1, 1954, pending these certiorari proceedings. (2nd R.-57, 58).

8. Petitioners would further show unto the Court that they are greatly aggrieved by aforesaid order of the Circuit Court entered August 25, 1954, denying Petitioners' motion to stay this suit and enjoining Elizabeth Donner Hanson from prosecuting aforesaid Delaware suit; that this Court should issue a writ of certiorari to review and reverse said order and correct the errors of said Court in entering

said order for the reason that it was not entered pursuant to or in accordance with the essential requirements of law in the following respects:

(a) The Court should have granted Petitioners' motion to stay and should not have denied the same. It appears from the record herein that the Circuit Court does not have jurisdiction of the subject matter of this cause nor does it have jurisdiction of indispensable parties hereto in that the assets which are the subject matter of this [fol. 171] suit are not situated in Florida either physically or constructively, nor have any of the parties holding said assets been personally served, nor have they submitted themselves to the jurisdiction of the Circuit Court. On the contrary, it appears from the record that the Court of Chancery of the State of Delaware in and for New Castle County, the County in which Wilmington Trust Company and Delaware Trust Company are situated, is the only Court (1) having jurisdiction of aforesaid Trusts, the Trustees and the trust assets, (2) which can appropriately and finally determine the validity of the exercises of powers of appointment herein involved and (3) whose decree would be entitled to full faith and credit under the Constitution of the United States. It further appears that continuance of the Florida suit would be oppressive, invalid, ineffective and unnecessary in view of the pendency of said Delaware suit, in which Respondents herein and the other interested parties can obtain appropriate and final determination and adjudication of their rights by a valid and enforceable judgment.

By not staying this suit the Court has subjected Petitioners, Respondents and the Estate of Dora Browning Donner to the incurring of substantial expenses for attorneys' fees and costs in preparation of the case for trial on the merits in Florida and its trial here, which are unnecessary in view of the pendency of the Delaware suit, and is unreasonably delaying the accounting and discharge of the Executrix.

(b) The Court should have denied Respondents' application for injunction and should not have enjoined Elizabeth Donner Hanson from prosecuting said Delaware suit,

for the same reasons assigned with respect to the error of the Court in denying Petitioners' motion to stay.

Wherefore, the premises considered, Petitioners pray that this Honorable Court will grant to them a writ of certiorari directed to and commanding the Clerk of the Circuit Court of Palm Beach County, Florida to transmit and certify to this Court the record and proceedings in said Court, subsequent to aforesaid first certiorari proceedings in this Court, including all additional pleadings and orders hereinabove referred to, and that this Honorable Court will thereupon proceed to review the same and [fol. 172] determine that the order entered August 25, 1954 is erroneous and void for the reasons pointed out, and that this Honorable Court will quash and set aside said order and direct the said Circuit Court to revoke and vacate said order and to grant Petitioners' motion to stay in this cause and to deny Respondents' application for injunction restraining the prosecution of said Delaware suit, and that this Court shall grant unto Petitioners such other and further relief as to this Court may seem fit and proper.

/s/ Wideman, Caldwell, Pacetti & Robinson,
/s/ Manley P. Caldwell, /s/ Madison F. Pacetti,
Attorneys for aforesaid Petitioners.

/s/ William H. Foulk, Of Counsel for Petitioners.

[fol. 173] *Duly sworn to by Manley P. Caldwell, jurat omitted in printing.*

[fol. 175] IN THE SUPREME COURT OF THE STATE OF FLORIDA

[Title omitted]

MOTION TO REMAND—Filed March 19, 1956

Come Now, Elizabeth Donner Hanson, as Executrix of the Will of Dora Browning Donner, deceased, individually and as Guardian ad litem of her children, Joseph Donner Winsor and Donner Hanson, and William D. Roosevelt, individually, Appellants herein, by their undersigned at-

torneys, and move this Court to remand this suit to the Circuit Court of Palm Beach County, Florida, with instructions to dismiss said suit on these grounds:

1. The Circuit Court of Palm Beach County in its summary final decree dated January 14, 1955, (R. 138), from which Appellants appealed to this Court, declared:

> "As to jurisdiction, the trust assets and the trustee are in Delaware. No personal service has been had upon the defendants who failed to answer [including the Trustees having custody of the trust assets]. The inclusion of the trust assets in her inventory, and an allowance of counsel fees and compensation for the executrix, although such an inclusion was later sought to be withdrawn, does not of itself give this court jurisdiction over those assets in Delaware or the Trustees. Hence, this court considers that it has no jurisdiction over the non-answering defendants."

Said Court in said decree further declared:

> "* * * the executrix should receive the assets and dispose of them agreeable to the will under which she was appointed."

[fol. 176] 2. Prior to the entry of said decree, to wit, on July 28, 1954, as more particularly set forth in paragraph 11 of the answer of Appellants filed in the lower Court, (R. 70) Appellant, Elizabeth Donner Hanson, as Executrix and Trustee under the last Will and Testament of Dora Browning Donner, deceased;

> "* * * intending to meet plaintiff's charge that she had failed to take steps to 'capture' assets belonging to said estate and in order to expedite the final determination of the controversy raised by plaintiffs * * * filed in the Court of Chancery of the State of Delaware, in and for New Castle County, a complaint for declaratory judgment against Wilmington Trust Company as Trustee, Delaware Trust Company as Trustee, the plaintiffs in this suit, and others, as defendants, asking the Court to determine the persons entitled to par-

ticipate in the assets held in trust by Wilmington Trust Company under the [subject] trust agreement * * * ."

3. Plaintiffs Appellees in this present suit, namely, Katherine N. R. Denckla and Elwyn L. Middleton, as Guardian of the property of Dorothy B. Stewart, did not appear in said action in the Court of Chancery of the State of Delaware, but the respective daughters of the said Katherine N. R. Denckla and Dorothy B. Stewart, namely, Paula Browning Denckla and Dorothy Stewart Lewis and Mary Washington Stewart Borie, all of whom claim through and are in privity with their mothers, Plaintiffs Appellees herein, joined issue in said Delaware action and participated in the prosecution thereof. The Court of Chancery of the State of Delaware appointed Robert P. Walls, Jr., Esq. guardian ad litem for Dorothy B. Stewart and the said Robert P. Walls, Jr., Esq. appeared and actively participated in all of the proceedings before said Court. (Exhibits A, B, C, & E).

4. The Court of Chancery of the State of Delaware, after hearing the parties appearing before it and after giving due consideration to the proceedings and the summary final decree herein of the Circuit Court for Palm Beach County, [fol. 177] Florida, declared in an opinion dated December 28, 1955, (a certified copy of which is annexed hereto marked Exhibit A):

1. "Since the purported Trust was created in Delaware and since the assets have been held by the Trustees in Delaware at all times, the 'home' of the Trust is in Delaware and its validity must be determined by the law of Delaware." (Exhibit A, page 11).

2. "It is held that the Agreement of 1935 created a valid *inter vivos* Trust. Since the Trust was valid, the exercises of the power of appointment thereunder by the instruments of 1949 and 1950 were valid * * *. Accordingly, the distributions made by Wilmington Trust Company constituted a proper discharge of its duties as Trustee under its agreement with Mrs. Donner." (Exhibit A, page 21).

5. On January 13, 1955, the said Court of Chancery entered its judgment in said action (a certified copy of which is annexed hereto marked Exhibit B) finalizing the conclusions reached in its aforesaid opinion, entering judgment pro confesso against the defendants not appearing therein, including plaintiff appellee herein, Katherine N. R. Denckla, and specifically declaring that:

> "All parties to this litigation are forever bound by the declarations, adjudications and determinations contained in subparagraphs (a) (b) (c) and (d) of paragraph (2) hereof." (Exhibit B, page 5).

In said subparagraphs, "it is expressly adjudged, declared and determined:

> "(a) That by virtue of the Agreement of March 25, 1935 between Dora Browning Donner and Wilmington Trust Company, a copy of which is attached as Exhibit B to the Complaint filed herein, there was created a valid trust under the laws of the State of Delaware;
>
> "(b) The execution and delivery by Dora Browning [fol. 178] Donner (sometimes referred to as Dora B. Donner) to the Wilmington Trust Company of the document dated December 3, 1949 (Complaint Exhibit C), and the execution and delivery by Dora Browning Donner to the Wilmington Trust Company of the document dated July 7, 1950 (Complaint Exhibit D), constituted valid and effective exercises of the power of appointment reserved to Dora Browning Donner under the agreement dated March 25, 1935, between Dora Browning Donner and Wilmington Trust Company (Complaint Exhibit B).
>
> "(c) The payments referred to in paragraph 15 of complaint made by Wilmington Trust Company, Trustee under the agreement dated March 25, 1935 between Dora Browning Donner and Wilmington Trust Company, to Delaware Trust Company, Trustee under Trusts No. 9022 and 9023, in accordance with Paragraph 2(a) of the instrument dated December 3, 1949 (confirmed by paragraph 2 of the instrument dated July 7, 1950) were valid and proper payments and constituted a lawful discharge of Wilmington Trust Com-

pany's duty as Trustee under said Agreement of March 25, 1935. (Exhibit B, page 4).

"(d) In addition to the payments specified in the preceding subparagraph (c) each and every other distribution made by defendant Wilmington Trust Company of property held by it pursuant to said Agreement of March 25, 1935 between Dora Browning Donner and Wilmington Trust Company as set forth in Paragraph 15 of the Complaint were valid and proper distributions and constituted a lawful discharge of Wilmington Trust Company's duty as Trustee under said Agreement of March 25, 1935." (Exhibit B, page 14).

6. Subsequent to the entry of said Judgment on January 19, 1956, the said Paula Browning Denckla, Dora Stewart Lewis and Mary Washington Stewart Borie filed their motion for new trial contending inter alia that the Court failed to give full faith and credit to the summary final [fol. 179] decree of the Circuit Court of Palm Beach County, Florida (the decree appealed from herein) (a certified copy of said motion being annexed hereto marked Exhibit C). Said motion was denied by said Court after hearing by order dated January 25, 1956 (a certified copy of said order being annexed hereto marked Exhibit D).

7. The said Paula Browning Denckla, Dora Stewart Lewis and Mary Washington Stewart Borie, under date of February 15, 1956, filed their praecipe for a writ of error from the judgment of the Court of Chancery (a certified copy of which is annexed hereto marked Exhibit E), which appeal is still pending, unreversed and not superseded.

Petitioner is advised and avers that she is bound by the judgment of the Court of Chancery of the State of Delaware as hereinbefore set forth, and that she will be bound by the determination of the Supreme Court of Delaware on said appeal, said Courts having jurisdiction of the trust assets and the Trustees as found by the said Court of Chancery and the lower Court in this suit:

Wherefore, Appellants move this Court to remand this suit to the Circuit Court of Palm Beach County, Florida, with instructions to dismiss this suit.

/s/ Caldwell, Pacetti, Robinson & Foster, /s/ Manley P. Caldwell, Attorneys for Elizabeth Donner Hanson, Individually and as Executrix, and William D. Roosevelt.

/s/ Edward McCarthy, Attorney for Elizabeth Donner Hanson, Guardian ad litem.

/s/ William H. Foulk, Of Counsel.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 180] *Duly sworn to ~~by~~ Manley P. Caldwell, jurat omitted in printing.*

[fol. 181] EXHIBIT A TO MOTION TO REMAND

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE, IN AND FOR NEW CASTLE COUNTY

Civil Action No. 531

ELIZABETH DONNER HANSON, as Executrix and Trustee under the Last Will of Dora Browning Donner, Deceased, Plaintiff,

v.

WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee, et al., Defendants.

December 28, 1955

Action for declaratory judgment. Upon cross-motions for summary judgment.

William H. Foulk, of Wilmington, for the plaintiff Elizabeth Donner Hanson, Executrix and Trustee

Caleb S. Layton (of Richards, Layton & Finger) of Wilmington, for the defendant Wilmington Trust Company, Trustee

Edwin D. Steel, Jr. (of Morris, Steel, Nichols & Arsht) of Wilmington, Guardian Ad Litem for the defendants, Joseph Donner Winsor, Curtin Winsor, Jr. and Donner Hanson

Josiah Marvel, Arthur G. Logan and Aubrey B. Lank (of Logan, Marvel, Boggs and Theisen) of Wil-

mington, for the defendants, Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla

Robert B. Walls, Jr., of Wilmington, Guardian Ad Litem for the defendants, Dorothy B. R. Stewart and William Donner Denckla

David F. Anderson (of Berl, Potter and Anderson) of Wilmington, for the defendant Delaware Trust Company, Trustee

[fol. 182] HERRMANN, Acting Vice Chancellor:

The court is called upon to decide (1) whether the doctrine of collateral estoppel precludes the parties from litigating in this action the issue of the validity of a certain written agreement as an *inter vivos* trust agreement; and, if not, (2) whether the trust and the exercises of the power of appointment thereunder are valid or invalid.

This action for declaratory judgment was brought by Elizabeth Donner Hanson, Executrix and Trustee under the Will of Dora Browning Donner, to determine the persons entitled to assets valued at $417,000. The assets were held at the time of the death of Mrs. Donner by the defendant Wilmington Trust Company under an Agreement entered into by them in 1935. After Mrs. Donner's death, the assets were distributed by Wilmington Trust Company to certain recipients named in Instruments executed by Mrs. Donner in 1949 and 1950 in the exercise of the power of appointment reserved to her under the Agreement of 1935.

The case is before the Court upon four motions for summary judgment. Three of the motions are based upon the contention that the Agreement of 1935 created a valid trust, that the power of appointment thereunder was validly exercised in 1949 and 1950; and that the distributions by Wilmington Trust Company pursuant thereto were properly made in discharge of its duty as Trustee under the Agreement. This is the position taken in the motions for summary judgment filed by the plaintiff,[1] by Wilmington

[1] The plaintiff has been barred from proceeding further herein by an injunction issued to her by the Circuit Court of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County, pursuant to the decree of that Court hereinafter discussed.

[fol. 183] Trust Company, Trustee, and Edwin D. Steel, Jr., Guardian Ad Litem for three minor defendants, Joseph Donner Winsor, Curtin Winsor, Jr. and Donner Hanson, grandchildren of Mrs. Donner. Opposed to this position is the cross-motion for summary judgment filed by the defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla, other grandchildren of Mrs. Donner. These defendants contend that by application of the doctrine of *res judicata* or collateral estoppel, or by reason of applicable principles of law, this Court must conclude that the Agreement of 1935 was an agency agreement and not a trust agreement; that, therefore, the Instruments of 1949 and 1950 were invalid testamentary acts and the transfer of assets by Wilmington Trust Company thereunder was erroneous because such assets should have been distributed under the Will of Mrs. Donner. These defendants cross-claim and seek a judgment against Wilmington Trust Company in the amount of $417,000. The defendant Delaware Trust Company, Trustee, supports the motions of the proponents of the Trust. Robert B. Walls, Jr., Guardian Ad Litem for the defendants Dorothy B. R. Stewart and William Donner Denckla, incompetent daughter and minor grandson of Mrs. Donner, supports the motion of the opponents of the Trust. The pending motions are based upon the pleadings and exhibits thereto, affidavits, depositions and certified copies of the Florida proceedings hereinafter discussed.

There does not appear to be any genuine issue as to any of the following facts:

[fol. 184] Under the Agreement with Wilmington Trust Company, dated March 25, 1935, Mrs. Donner transferred to it certain designated securities. The Agreement provided that Wilmington Trust Company, as Trustee, should pay the net income of the trust fund to Mrs. Donner for life and, upon her death, should transfer the trust fund, free from the trust, "unto such person or persons * * * as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee."

Thereafter, Mrs. Donner executed and delivered to Wilmington Trust Company an Instrument, dated December 3, 1949, in which, after revoking earlier Instruments by which she purportedly had exercised her power of appointment;

she again purported to exercise the power of appointment by directing that, upon her death, the Trustee should transfer the trust fund as follows: (1) $4,000. to three named individuals; (2) $1,000. to each of certain servants; (3) $10,000. to Louisville Trust Company in trust for Benedict H. Hanson, a son-in-law of Mrs. Donner; (4) $10,000. to the Bryn Mawr Hospital; (5) $200,000. to the Delaware Trust Company in trust for Joseph Donner Winsor; (6) $200,000. to the Delaware Trust Company in trust for Donner Hanson; and (7) the residue to the Executrix under Mrs. Donner's Will to be dealt with as stated therein. Mrs. Donner thereafter executed and delivered to Wilmington Trust Company an Instrument, dated July 7, 1950, which purported to partially revoke the Instrument of December 3, 1949 by deleting therefrom the provision for $10,000. to the Louisville Trust Company, Trustee. In all other respects, the Instrument of 1950 confirmed the Instrument of 1949.

[fol. 185] At the time of the execution of the Agreement of 1935, Mrs. Donner was a resident of Pennsylvania. The securities referred to in the Agreement were delivered to Wilmington Trust Company in Delaware and they remained in Delaware in the possession of and under the administration of the Trust Company. Wilmington Trust Company has no place of business and transacts no business outside of Delaware.

When Mrs. Donner died in 1952, she was a resident of Palm Beach County, Florida, and had been such since 1944. The Will of Mrs. Donner, dated December 3, 1949, was probated there and the plaintiff herein, Elizabeth Donner Hanson, duly qualified as Executrix under the Will. After bequeathing her personal and household effects to Mrs. Hanson and Dora Donner Ide, two of her daughters, Mrs. Donner made the following disposition of the residue of her property "including any and all property, rights and interest over which I may have power of appointment which prior to my death has not been effectively exercised by me or has been exercised by me in favor of my Executrix": (1) Payment of all death taxes on property appointed by Mrs. Donner under the 1935 Agreement; and (2) the balance to be divided into two equal parts: (a) one part to Dela-

ware Trust Company in trust for Katherine N. R. Denckla, another daughter; and (b) the other part to Mrs. Hanson in trust for Dorothy B. Rodgers Stewart, another daughter, during her lifetime and after her death to Delaware Trust Company in trust for Mrs. Denckla.

When Mrs. Donner died, the securities and cash held by Wilmington Trust Company under the 1935 Agreement amounted to $1,493,629.91. Thereafter, Wilmington Trust Company distributed cash and securities aggregating [fol. 186] $417,000. in accordance with the provisions of the Instruments of 1949 and 1950 and deposited the balance to the account of Mrs. Hanson as Executrix and Trustee under the Will of Mrs. Donner. None of the trust funds distributed to Delaware Trust Company, Trustee, have ever been held or administered outside of Delaware.

In January 1954, Mrs. Denckla and Elwin L. Middleton, guardian of the property of Mrs. Stewart, brought an action in the Circuit Court of Palm Beach County, Florida, against Mrs. Hanson, individually and as Executrix of Mrs. Donner's Will, Wilmington Trust Company, Delaware Trust Company and others who were interested in the assets, directly or beneficially, by reason of appointment or the residuary clause of the Will. The Florida action sought a declaratory judgment determining what passed under the Will and the authority of the Executrix over the assets held by Wilmington Trust Company under the 1935 Agreement. Neither Wilmington Trust Company, Delaware Trust Company nor any of the other appointees under the Instrument of 1949, named defendants in the action, were served personally and they did not appear in the action. None of the assets held by Wilmington Trust Company under the Agreement of 1935 have ever been held or administered in Florida. On January 14, 1955, a "summary final decree" was entered by the Florida Court holding (1) that the Court lacked jurisdiction over the assets in Delaware and over Wilmington Trust Company, Delaware Trust Company, and the other non-answering defendants and that the complaint be dismissed without prejudice as to all such defendants; and (2) that no present interest passed to any beneficiary other than Mrs. Donner under the Agreement of 1935 and the [fol. 187] Instrument of 1949 and that the Instrument was

testamentary in character and invalid as a testamentary disposition because it was not subscribed by two witnesses as required by Florida law; and (3) that, therefore, as to the parties before the Florida Court, the assets held by Wilmington Trust Company under the Agreement of 1935 passed under the residuary clause of Mrs. Donner's Will.

In the meanwhile, in July 1954, the instant action was begun by Mrs. Hanson as Executrix and Trustee under Mrs. Donner's Will. Named herein as defendants are Wilmington Trust Company as Trustee, Delaware Trust Company as Trustee, the appointees named in the Instruments of Appointment executed by Mrs. Donner, residuary legatees under Mrs. Donner's Will and others having beneficial interests. The complaint herein alleges that it was filed because of the desire of the Executrix to settle the matters in controversy finally and conclusively "as to all parties so that she may effectively perform all of her duties, account as Executrix and enter upon her duties as Trustee." The complaint alleges that no part of the assets involved were located in Florida and that Wilmington Trust Company, Delaware Trust Company and certain other indispensable parties were not before the Florida Court; that, therefore, that Court could not render "an effective and binding decree." The prayer of the complaint in this action is that this Court determine by declaratory judgment the persons who, at the time of Mrs. Donner's death, were entitled to participate in the assets held in trust by Wilmington Trust Company under the 1935 Agreement.

[fol. 188] I. *Collateral Estoppel*

The first question to be decided is whether by reason of the Florida decree, the parties hereto are precluded from litigating in this action the issue of the validity of the Agreement of 1935 as a trust agreement. This is the ultimate question because the validity of the exercises of the power of appointment depends, in this case, upon the validity of the basic Agreement. See *Wilmington Trust Company, et al.* v. *Wilmington Trust Company, et al.*, 26 Del. Ch. 397, 24 A. (2d) 309, 312.

The opponents of the Trust assert the doctrine of *res judicata* and collateral estoppel. The doctrine of *res*

judicata is not applicable because the Florida action and this action involve different causes of action. The refinement of the *res judicata* doctrine known as the doctrine of collateral estoppel may be applicable, however, the difference in causes of action notwithstanding. See *Niles* v. *Niles*, —— Del. Ch. ——, 111 A. (2d) 697; *Petrucci* v. *Landon*, —— Terry ——, 107 A. (2d) 236; *Scott, "Collateral Estoppel by Judgment"*, 56 Harv. L. Rev. 1. The question, then, is whether the doctrine of collateral estoppel may be invoked as an affirmative defense by the opponents of the Trust to preclude the other parties from obtaining a determination by the courts of this State as to the validity of the Trust. I am of the opinion that this question must be answered in the negative.

The Florida Court made determinations incidentally that it would not have had the jurisdiction to make directly. The action before the Florida Court was brought to determine what passed under the residuary clause of the Will of [fol. 189] Mrs. Donner, a Florida domiciliary. As necessary but incidental determinations in that action, the Florida Court concluded that the Agreement of 1935 was invalid as a trust agreement and that, therefore, the exercise of the power of appointment in 1949 was testamentary.[2]

In a direct proceeding, the Florida Court would not have had the jurisdiction to determine the essential validity of an *inter vivos* trust created in Delaware, all of the assets of which were in Delaware and the Trustee of which is a Delaware corporation which was not before the Court. Since neither the Trust *res* nor the Trustee were within the jurisdiction of the Florida Court, it is clear that that Court could not have determined the essential validity of the purported Trust in a direct proceeding brought for the purpose. *54 Am. Jur. "Trusts"* §§564, 584; *Lines* v. *Lines*, 142 Pa. 149, 21 A. 809; compare *In re Harriman's Estate*, 124

[2] The decree of the Florida Court contained no expressed conclusion regarding the invalidity of the agreement of 1935 as an agreement of trust. Since, however, such determination must have been made before the Court could reach the expressed conclusion that the exercise of the power was testamentary, the prerequisite determination as to the invalidity of the Agreement must be said to be implicit in the decree.

Misc. Rep. 320, 208 N.Y.S. 672; *Harvey, et al.* v. *Fiduciary Trust Co., et al.*, 299 Mass. 457, 13 N.E. (2d) 299; *Land, "Trusts in the Conflict of Laws"*, Secs. 41, 43.

The principle is settled that where a court has incidentally determined a matter which it would have had no jurisdiction to determine directly, the judgment is not conclusive in a subsequent action brought to determine directly such [fol. 190] incidental matter. In his important and widely quoted discussion of *"Collateral Estoppel by Judgment"*, 56 Harv. L. Rev. 1, 18, Professor A. W. Scott states:

> " * * * . It may happen, however, that the court has jurisdiction to determine the cause of action, but that in determining it the court must necessarily decide a question which it would have no jurisdiction to determine in an action brought expressly for its determination. In such a case the judgment of the court is valid, and the cause of action will be extinguished, the judgment operating by way of merger or bar. The question then arises as to the effect by way of collateral estoppel of the determination of the particular matter on which the judgment was based. Although the authorities are somewhat meager, it seems clear that the judgment should not preclude the parties as to the matter in a subsequent action between them brought expressly to determine the matter in a court which has jurisdiction to determine it. It seems clear, also, that after such determination in a subsequent suit, it is the determination of the court in that suit, and not the incidental determination in the prior suit, which is conclusive between the parties."

See also *Restatement of Judgments*, § 71; *Petrucci* v. *Landon, supra;* dissent of Rutledge, J. in *Geracy* v. *Hoover*, 77 U.S. App. D.C. 55, 133 F. (2d) 25, 147 A.L.R. 185.

In the final analysis, the question becomes one of public policy. At *56 Harv. L. Rev.* 1, 22, Professor Scott states:

> "The question in all these cases is one of public policy. Should a court which has not been entrusted with jurisdiction to determine a matter directly be permitted to determine it incidentally, not merely for the purpose

> of deciding the controversy which it can properly decide, but also with the effect of precluding the parties from litigating the question in those courts which alone are entrusted with jurisdiction to determine it directly?"

[fol. 191] This eminent authority on the subject concludes with the admonition that the application of the doctrine of collateral estoppel must always be based upon a sound public policy and that care "must be exercised in its application to see that it works no injustice."

It is my opinion that it would be contrary to sound public policy for this Court to consider itself bound and divested of its duty to determine the essential validity of a Delaware *inter vivos* trust in a direct proceeding brought for the purpose on the ground that a Court in a sister jurisdiction has incidentally determined the matter in another cause of action in which neither the trust *res* nor the Trustee was before the Court. The doctrine of collateral estoppel is a judge-made rule. I do not think that it should be enlarged to the extent of depriving the parties herein of a direct determination by this Court as to the validity of the Trust.

Since the purported Trust was created in Delaware and since the assets have been held by the Trustees in Delaware at all times, the "home" of the Trust is in Delaware and its validity must be determined by the law of Delaware. *Wilmington Trust Company, et al.* v. *Wilmington Trust Company, et al., supra; Wilmington Trust Company* v. *Sloane*, 30 Del. Ch. 103, 54 A. (2d) 544. This is a case of first impression in this State as to an important phase of the question of the validity of the Trust. The law of this State must be formulated here. It would be contrary to public policy for the Courts of this State to relinquish their duty of enunciating the law controlling a trust having its situs in Delaware [fol. 192] and to thereby relegate the Trustee and the Trust *res* here involved to the law prevailing in another jurisdiction. Compare *Taylor, et al.* v. *Crosson, et al.*, 11 Del. Ch. 145, 98 A. 375.

Moreover, the application of the doctrine of collateral estoppel might work injustice in this, a case which involves only questions of law. It could mean that the parties who

were before the Court in the Florida action would be subjected to one conclusion of law while Wilmington Trust Company, Delaware Trust Company and other appointees and beneficiaries, who did not appear in the Florida action, would be controlled by a different rule of law. This could mean that (1) as to the parties before the Florida Court, the disposition of assets would be governed by the residuary clause of the Will, but (2) as to the parties who were not before the Florida Court, the disposition of assets would be governed by the terms of the 1935 Agreement and the exercises of the power of appointment thereunder. This would result in chaos and injustice. The possibility of such result militates against application of the doctrine of collateral estoppel in any case. See *Restatement of Judgments*, § 70 and com. f, 1948 Supp.; *Scott "Collateral Estoppel by Judgment"*, 56 Harv. L. Rev. 1, 10.

The opponents of the Trust place principal reliance upon *Niles* v. *Niles, supra*. That case is not applicable because there the issue previously determined incidentally by the New York Court also arose incidentally before the Chancellor. I do not consider anything stated herein to be in conflict with the decision in the *Niles* case. The other cases [fol. 193] cited by the opponents of the Trust have been examined and have been found to be inapposite. See *Slater* v. *Slater*, 372 Pa. 519, 94 A. (2d) 750; *Ugast* v. *LaFontaine*, 189 Md. 227, 55 A. (2d) 705; *United States* v. *Silliman* (C.C.A. 3) 167 F. (2d) 607; *William Whitman Co.* v. *Universal Oil Products Co.* (D.Del.) 92 F. Supp. 885; *United States* v. *Moser*, 274 U.S. 225, 47 S.Ct. 616.

It is concluded that no determination made in the Florida action is conclusive in this action as to the validity of the Agreement of 1935 as a trust agreement. The parties herein will not be precluded by the defense of collateral estoppel from obtaining the decision of this Court upon that issue.

II. *Essential Validity of the Trust Agreement*

In order to determine the essential validity of the Agreement of 1935 as a trust agreement, it is necessary to consider its pertinent provisions in some detail.

The Agreement was a formal document, executed by Mrs. Donner and Wilmington Trust Company, in which Mrs.

Donner was referred to as Trustor and Wilmington Trust Company was referred to as Trustee. It was recited that the Trustor "desires to establish a trust of certain securities and property" referred to as the "trust fund". It was stated that the Trustor thereby "assigned, transferred and delivered" certain listed securities and property to the Trustee in trust to "hold, manage, invest and reinvest the trust fund, collect the income thereof and pay out of such income all taxes, charges and expenses payable thereout". The Agreement provided for the payment of the net income of [fol. 194] the trust fund to the Trustor during her lifetime and, upon her death, the Trustee was directed to convey the fund "free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee"; or in the absence of such instrument, "by her Last Will and Testament, or in default of any such appointment then unto the then living issue of Trustor, per stirpes and not per capita". In default of exercise of the power of appointment and living issue, the fund was to go to the Trustor's next of kin. The Agreement then conferred upon the Trustee all of the ordinary general and broad powers usually conferred upon a Trustee, including the power to retain any and all stocks and securities, to sell and exchange the same, to invest the proceeds of any sales, to vote stock, to participate in reorganizations, to determine whether expenses and other disbursements shall be charged against income or principal, and to hold bearer securities in its own name or in the name of its nominees. It was provided, however, that the Trustee shall exercise its power to sell or exchange trust property, to invest the proceeds of any such sale or other available money and to participate in plans of reorganization, merger, etc., only upon the written direction of, or with the written consent of the Adviser of the trust; provided that if there should be no Adviser, or if the Adviser should fail to act within a ten day period, the Trustee might exercise all such powers [fol. 195] and "take such action in the premises as it, in its sole discretion, shall deem to be for the best interest of the beneficiary of this trust". The Trustor named as Adviser

her husband or "such other person or persons as Trustor may nominate in writing delivered to Trustee during her lifetime". The Trustor reserved the right to amend or revoke the Trust Agreement in whole or in part and, further, she reserved the right to change the Trustee.

Thus, by the Agreement of 1935, Mrs. Donner reserved to herself the following significant rights and powers: (1) the right to all of the net income for life; (2) the right to amend or revoke the Agreement in whole or in part; (3) the right to change the Trustee; (4) the right to name and change an investment Adviser. The question here presented revolves about those reservations. The opponents of the Trust contend that the cumulation of the reservations created an agency relationship between Mrs. Donner and the Wilmington Trust Company and not a trust relationship; that, therefore, the disposition, insofar as it was intended to take effect after Mrs. Donner's death, was testamentary and invalid for failure to comply with the Florida law relating to the validity of Wills.

It is my opinion that under the law of this State, which governs the essential validity of the Agreement of 1935 as a trust agreement, the reservations of rights and powers made therein by Mrs. Donner did not defeat the *inter vivos* trust she so clearly intended to create by that Instrument. [fol. 196] The law seems settled as to the first three reservations here involved. *Equitable Trust Co.* v. *Paschall, et al.*, 13 Del. Ch. 87, 115 A. 356, stands for the proposition that the reservation of a life interest plus the reservation of the power to revoke an *inter vivos* trust does not invalidate the trust. See also *1 Scott on Trusts*, § 57.1; *Restatement of Trusts*, § 57; *1 Bogert, Trusts and Trustees*, p. 483; *Leahy* v. *Old Colony Trust Co.*, 326 Mass. 49, 93 N.E. (2d) 238. Furthermore, the power of the settlor of an *inter vivos* trust to change the trustee has judicial sanction in this State. See *Wilmington Trust Co., et al.* v. *Wilmington Trust Co., et al., supra.*

The brunt of the attack on the Agreement of 1935 is centered upon its provisions for the appointment of an investment Adviser and the requirement that the Trustee be governed by the Adviser as to (1) any sale or exchange of trust property; (2) any investment of the proceeds of such

sale or of other available money; and (3) any participation in plans of reorganization, merger, etc., of any company in which the Trustee might hold securities. It appears that the effect of such provisions upon the validity of an *inter vivos* trust has not been directly decided in this State.

It seems to be settled that an intended *inter vivos* trust does not become testamentary because the trustor reserves the power to direct the trustee as to the making of investments. See *Restatement of Trusts*, § 57(2) and comment thereon; *1 Scott on Trusts*, § 57.2 *1 Bogert, Trusts and Trustees*, § 104; *National Shawmut Bank of Boston* v. *Joy*, 315 Mass. 457, 53 N.E. (2d) 113, 125. If the trustor may personally direct or veto investments by the trustee without impairing the validity of an *inter vivos* trust, it would [fol. 197] seem to follow that the trustor may assign that authority to a third party, called "adviser", without destroying the validity of the trust. Such investment counselor has been considered to be a fiduciary, a co-trustee or a quasi-trustee. See *Gathright's Trustee* v. *Gaut*, 276 Ky. 562, 124 S.W. (2d) 782 and *Annotation 120 A.L.R.* 1407; *Restatement of Trusts*, § 185; *Scott on Trusts*, § 185; *1 Bogert, Trusts and Trustees*, p. 536. In *Equitable Trust Co.* v. *Union National Bank*, 25 Del. Ch. 281, 18 A. (2d) 288, this Court found it unnecessary to determine whether or not an investment adviser was a fiduciary. Whatever the precise relationship between the Trustor and the Adviser or the Trustee and the Adviser may be called, I think it is clear that if Mrs. Donner might have reserved to herself the power to specify investments and to direct or veto the Trustee as to investment policy, without impairing the validity of the *inter vivos* Trust, she may properly delegate that power to another without destroying the *inter vivos* Trust she so clearly intended to create.

The intent of the Trustor is a critical and controlling factor in determining whether an agency or a trust was created by the Agreement of 1935. See *1 Scott on Trusts* (1954 Supp.) § 57.2, p. 74. It is beyond question, I think, that it was Mrs. Donner's intent that the 1935 Agreement should create an *inter vivos* trust. In the document, she called herself "Trustor", she called Wilmington Trust Company "Trustee" and she referred to the "trust fund" she was thereby conveying to the Trustee.

[fol. 198] It appears that there is no established limit to the nature of extent of the powers which the settlor of a valid *inter vivos* trust may reserve so long as the settlor does not reserve the right to control the trustee as to the details of the administration of the trust. If, however, the settlor reserves such power to control the trustee as to the details of the administration of the trust as to make the trustee a mere agent of the settlor, the disposition may be testamentary so far as it is intended to take effect after the settlor's death. See *Restatement of Trusts*, § 57(2); *1 Bogert, Trusts and Trustees*, § 104, p. 490.

In the Agreement of 1935, Mrs. Donner did not reserve to herself control over the details of the administration of the Trust as would constitute the Trustee an agent under the principle above stated. In the Agreement, she conveyed title and broad powers to the Trustee limited only by the obligation of the Trustee to consult and follow the advice of the investment counselor. The opponents of the Trust contend, however, that an examination of the actual operation of the Trust Fund, as disclosed by affidavits and depositions, reveals that the Trustee permitted the Adviser to usurp all of its powers and functions as to the details of administration and that, in reality, the Trustee was nothing more than a custodian of the securities.

Under the circumstances of this case, the *modus operandi* adopted by the Trustee and the Adviser is immaterial to the question of whether the Agreement of 1935 created a [fol. 199] relationship of trust or of agency. In the absence of ambiguity, fraud, duress or mistake, the intent of the Trustor and the nature of the relationship created by the Agreement of 1935 is to be determined from the face of the Instrument itself. See *Restatement of Trusts*, § 38(2), Comment a: There is no showing that Mrs. Donner knew of the facts relied upon by those who assert an agency instead of a trust, nor is there any showing that she was in any way responsible for any surrender of function which may have taken place as between the Trustee and the Adviser in the operation of the trust. Even if we disregard its vigorous denials and assume that the Trustee abandoned its powers and duties to the Adviser, as asserted by the opponents of the Trust, such situation would not convert a trust agree-

ment into an agency agreement in the absence of the knowledge or consent of Mrs. Donner. A trustor, intending to create an *inter vivos* trust, may not be thwarted by an *ex parte* act or failure to act on the part of the trustee.

It is manifest upon the face of the Agreement that an *inter vivos* trust was intended. Effect will be given to the Agreement in accordance with its plain terms so that the clear intent of the Trustor will not be defeated.

The opponents of the Trust place principal reliance upon *Restatement of Trusts*, § 56; *In re Pengelly's Estate*, 374 Pa. 358, 97 A. (2d) 844; *Frederick's Appeal*, 52 Pa. 338; and *Hurley's Estate*, 16 Pa. D.&C. 521. In *Restatement of Trusts*, § 56, it is stated that if no interest passes to the beneficiaries before the death of the settlor, the intended trust in testamentary. That principle is not applicable in [fol. 200] the instant case because present interests were created at the time of the execution and delivery of the Agreement of 1935 and the exercises of the power of appointment thereunder. The agreement provided for an ultimate disposition of the assets to "then living issue of Trustor", subject to defeasance by revocation or exercise of the power of appointment. Present interests were thus created when the Agreement and exercises thereunder were executed, even though such interests could not fall into possession until after the death of Mrs. Donner and even though such interests might be ultimately defeated by further exercise of the power of appointment or by revocation. See *1 Bogert, Trusts and Trustees*, pp. 480-483; *Restatement of Property*, § 157, Comments P, Q, and R; *Gray on Perpetuities*, § 112; *Simes, Future Interests*, § 80; *Leahy* v. *Old Colony Trust Co., supra.* Since present interests passed under the Agreement and the exercises of the power of appointment and only the enjoyment thereof was postponed until the Settlor's death, the *inter vivos* trust here is not defeated by application of the principle stated in § 56 of the *Restatements of Trusts.* See *Brown* v. *Pennsylvania Company*, 2 W.W. Harr. 525, 126 A. 715; *Security Trust & Safe Deposit Co.* v. *Ward*, 10 Del. Ch. 408, 93 A. 385; *Wilmington Trust Co., et al.* v. *Wilmington Trust Co., et al., supra; Restatement of Trusts*, § 57 (1); *1 Scott on Trusts*, § 57.1.

The case of *In re Pengelly's Estate, supra,* does not aid the opponents of the Trust because that case is distinguishable on its facts. There it was found by the Court that the trust instrument merely continued a previously existing [fol. 201] agency relationship and the Settlor had reserved complete power to control the Trustee in the administration of the trust. Moreover, the Court in the cited case was concerned with the public policy requiring protection of the rights of widows. The cases of *Frederick's Appeal, supra* and *Hurley's Estate, supra,* are likewise clearly distinguishable on their facts and of no assistance.

It is held that the Agreement of 1935 created a valid *inter vivos* Trust. Since the Trust was valid, the exercises of the power of appointment thereunder by the Insfruments of 1949 and 1950 were valid. *Wilmington Trust Co., et al.* v. *Wilmington Trust Co., et al., supra.* Accordingly, the distributions made by Wilmington Trust Company constituted a proper discharge of its duties as Trustee under its Agreement with Mrs. Donner.

The motions for summary judgment filed by the Lewis defendants will be denied. The other motions for summary judgment filed herein will be granted.

[fol. 202] STATE OF DELAWARE,
KENT COUNTY, *ss.*:

I, T. E. Townsend, Jr., Clerk of the Supreme Court of the State of Delaware, do hereby certify that the foregoing is a true and correct copy of Item #68 of the Record in the cause

Dora Stewart Lewis, et al., :
v. : No. 8, 1956
Elizabeth Donner Hanson :

as the same remains on file and of record in said Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Dover this 6th day of March A. D. 1956.

/s/ T. E. Townsend, Jr.
Clerk of the Supreme Court.

[fol. 203] EXHIBIT B TO MOTION TO REMAND

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

Civil Action No. 331

ELIZABETH DONNER HANSON, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased, Plaintiff,

v.

WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee, et al., Defendants.

JUDGMENT

AND NOW TO-WIT this 13th day of January, A. D. 1956, the above entitled action for a declaratory judgment and other and further relief having been referred for hearing and determination to the Honorable Daniel L. Herrmann as Acting Vice Chancellor by order of July 19, 1955; and having come on to be heard upon (1) the Motion for Summary Judgment of Edwin D. Steel, Jr., guardian *ad litem* for Joseph Donner Winsor, Donner Hanson and Curtin Winsor, Jr. filed November 18, 1954, (2) the Motion for Summary Judgment of Wilmington Trust Company filed June 21, 1955, and (3) the Motion for Summary Judgment of Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla filed July 22, 1955; and the Court having considered the pleadings and exhibits, affida-
[fol. 204] vits, depositions, certified copies of the Florida proceedings and other documents filed in support of and in opposition to said motions for summary judgment; briefs having been filed and the Court having heard oral argument; and the Court having found that there is no genuine issue as to any material fact and having concluded that

Edwin D. Steel, Jr., guardian *ad litem* for Joseph Donner Winsor, Donner Hanson and Curtin Winsor, Jr., and Wilmington Trust Company are entitled to judgment as a matter of law; and the Court having filed its Opinion dated December 28, 1955;

And it appearing that prior to the entry of said Order of reference of July 19, 1955, several other motions had been filed and were pending, to-wit:

Motion of Defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla to Disiniss filed September 27, 1954;

Motion of Wilmington Trust Company and Delaware Trust Company filed February 17, 1955 for default judgment under Rule 55(b);

Motion of Robert B. Walls, Jr., guardian *ad litem* of Dorothy B. R. Stewart filed February 18, 1955 to strike motion of Wilmington Trust Company and Delaware Trust Company for default judgment;

Motion of Defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla filed February 23, 1955 to strike motion of Wilmington Trust Company and Delaware Trust Company for default judgment;

and it appearing that subsequent to the entry of said Order of Reference of July 19, 1955 several additional motions, a counterclaim and two cross claims were filed, to-wit:

[fol. 205] Counterclaim of defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla against Elizabeth Donner Hanson, Executrix and Trustee, etc. filed July 22, 1955;

Cross claim of defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla against Wilmington Trust Company and Delaware Trust Company filed July 22, 1955;

Motion of Edwin D. Steel, Jr., guardian *ad litem* as aforesaid filed September 22, 1955 for default judgment pursuant to Rule 55(b);

Motion of Robert B. Walls, Jr., guardian *ad litem* of Dorothy B. R. Stewart filed September 22, 1955 to strike motion of Edwin D. Steel, Jr., guardian *ad litem* as aforesaid, for default judgment; and

Motion of defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla filed September 27, 1955 to strike motion of Edwin D. Steel, Jr., guardian *ad litem* as aforesaid for default judgment;

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and it appearing to the Court that the disposition of all of said additional motions, the counterclaim and two cross claims is now appropriate because of the disposition of said three motions for summary judgment made by Paragraphs (1) and (2) of this Order;

IT IS ORDERED, ADJUDGED AND DECREED

(1) That the Motion to Dismiss filed September 27, 1954 and the Motion for Summary Judgment filed July 22, 1955 by defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla be and the same hereby are denied;

[fol. 206] (2) That the Motion for Summary Judgment of Edwin D. Steel, Jr., guardian *ad litem* for Joseph Donner Winsor, Donner Hanson and Curtin Winsor, Jr. filed November 18, 1954 and the Motion for Summary Judgment of Wilmington Trust Company filed June 21, 1955 be and the same hereby are granted, and in accordance with said motions and the prayers of the complaint it is expressly adjudged, declared and determined:

(a) That by virtue of the Agreement of March 25, 1935 between Dora Browning Donner and Wilmington Trust Company, a copy of which is attached as Exhibit B to the Complaint filed herein, there was created a valid trust under the laws of the State of Delaware;

(b) The execution and delivery by Dora Browning Donner (sometimes referred to as Dora E. Donner) to the Wilmington Trust Company of the document dated December 3, 1949 (Complaint Exhibit C), and the execution and delivery by Dora Browning Donner to the Wilmington Trust Company of the document dated July 7, 1950, (Complaint Exhibit D), constituted valid and effective exercises of the power of appointment reserved to Dora Browning Donner under the agreement dated March 25, 1935, between Dora Browning Donner and Wilmington Trust Company (Complaint Exhibit B).

(c) The payments referred to in paragraph 15 of complaint made by Wilmington Trust Company, Trustee under the agreement dated March 25, 1935 between Dora Browning Donner and Wilmington Trust Company, to Delaware Trust Company, Trustee under Trusts No. 9022 and 9023, in accordance with paragraph 2(a) of the instrument dated December 3, 1949 (confirmed by paragraph 2 of the in-
[fol. 207] strument dated July 7, 1950) were valid and proper payments and constituted a lawful discharge of Wilmington Trust Company's duty as Trustee under said Agreement of March 25, 1935.

(d) In addition to the payments specified in the preceding subparagraph (c) each and every other distribution made by defendant Wilmington Trust Company of property held by it pursuant to said Agreement of March 25, 1935 between Dora Browning Donner and Wilmington Trust Company as set forth in Paragraph 15 of the Complaint were valid and proper distributions and constituted a lawful discharge of Wilmington Trust Company's duty as Trustee under said Agreement of March 25, 1935.

(3) All parties to this litigation are forever bound by the declarations, adjudications and determinations contained in subparagraphs (a), (b), (c) and (d) of Paragraph (2) hereof.

(4) That the counterclaim of defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla against Elizabeth Donner Hanson, as Executrix and Trustee under the last Will and Testament of

3.

Respondents admit that they did not appear in said action in the Court of Chancery in Delaware, and they allege that they are not bound by said Delaware decree. They deny that the daughters of Katherine N. R. Denckla and Dorothy [fol. 230] B. Stewart are claiming through or in privity with their mothers.

4.

Respondents admit that the opinion mentioned in paragraph 4 of said motion to remand was written by the Chancellor in Delaware but allege that it was written more than eleven months after the final decree was entered in the Florida chancery court. Furthermore, said opinion in Delaware is not a sound legal opinion as will be shown in the brief presented for filing herewith.

5.

Respondents admit the issuance of the judgment by the Chancery Court of Delaware on January 13, 1955, but allege that they are not bound by the same as it was entered more than twelve months after the Florida Chancery decree; that the full faith and credit clause of the Constitution of the United States required the Chancery Court in Delaware to recognize the prior Florida Chancery decree which is now on appeal in this case, having been appealed by said movants, and now set for oral argument on March 27, 1956, in the Supreme Court of Florida. Said Delaware Chancery decree is not a sound decree, as the Chancellor in Delaware overlooked certain principles of law which would have prevented the entry of such decree if they had been considered, as will be shown in the brief presented herewith.

6.

Respondents admit the allegations contained in paragraph 6 of the complaint, but allege that the order therein mentioned is not binding on the courts in Florida for the reasons set forth in the brief presented for filing herewith.

Respondents admit the allegations contained in the first paragraph of paragraph number 7 of said motion to remand.

As to the allegations contained in the second paragraph of paragraph 7, respondents deny that the said Elizabeth Donner Hanson, individually or otherwise, is bound by the judgment in the Chancery Court of Delaware and allege that she was enjoined by the Chancellor in Palm Beach County, Florida, from proceeding in any manner with said chancery case in Delaware which she had filed (R. 72) as executrix and as trustee under the will of Dora Browning Donner. Now, she alleges that said chancery case in Delaware has proceeded to judgment and that the Florida courts are bound thereby, despite the injunction of the Florida courts.

Although it has been more than two months since said Delaware judgment or decree was entered on January 13, 1956, appellants have waited until eight days before the date set for the argument of their appeal in the Supreme Court of Florida to serve their motion to remand this case to the lower court for dismissal, but respondents are replying promptly so there will be no delay in the hearing before the Supreme Court of Florida. Respondents allege that said motion to remand is but another step in the inordinate delays appellants have occasioned in this case by various motions, petitions for certiorari, and other delaying tactics, which they have pursued in order to try to deprive the courts of Florida of jurisdiction, while they attempted to get a decision in their favor in Delaware so [fol. 232] as to plead the full faith and credit clause of the Constitution of the United States.

Dora Browning Donner was a citizen of Florida, at the time of her death, and her estate is being administered under her will in the Florida courts in Palm Beach County by her daughter, Elizabeth Donner Hanson, movant herein, who is also a Florida resident and who has been personally served in this case and has appeared herein, both individually and as executrix.

Nearly six months after the appellees, as legatees under the will, had filed suit against movant and all other inter-

ested parties known to them, and after she had lost her first petition for certiorari before the Supreme Court of Florida in this case, she filed in Delaware a complaint for declaratory decree (R. 72) which has the earmarks of an attempt to lose the case in Delaware so as to try to deprive the courts of Florida of jurisdiction. Said complaint did not point out the relation between the will and the trust instrument and did not point out to the Delaware Court that the trust instrument provides that if the power of appointment was invalid, the trust assets passed under the will, now on probate in Palm Beach County, Florida. The Chancellor in Delaware overlooked this important principle in his opinion and in his judgment.

As explained in the brief of appellees, beginning on page 5, this case originated by complaint for declaratory decree, filed by the appellees in Palm Beach County, Florida, on January 22, 1954 (R. 1). The appellants, as defendants in the lower court, filed a motion to dismiss, which [fol. 233] the Honorable C. E. Chillingworth, Circuit Judge, denied on April 9, 1954. The defendants then filed a petition for certiorari in the Supreme Court of Florida wherein they raised the identical grounds for reversal which they have raised in their appeal from the final decree. The petition for certiorari was promptly denied by the Supreme Court of Florida, and the mandate of the Supreme Court was filed in the lower court on July 1, 1954.

The defendants, appellants herein, thereafter filed an answer (R. 63), on August 3, 1954, and they also filed a motion to stay further proceedings in the Circuit Court of Palm Beach County, Florida (R. 83). They alleged that Elizabeth Donner Hanson, as executrix and trustee under said will, had just filed a similar complaint for declaratory decree in Delaware on July 28, 1954; this complaint was filed in Delaware after the mandate from the Supreme Court of Florida had been filed in the lower court. As this was patently an attempt to deprive the Florida courts of jurisdiction to pass on the questions involved in this case, the plaintiffs, appellees herein, filed an application for injunction (R. 85) in the lower court, in Palm Beach County, on August 16, 1954, to enjoin the appellants from proceeding further with the Delaware case.

The Honorable Jos. S. White issued an injunctive order on August 25, 1954, (R. 118). The appellants, as defendants in the lower court, sought a review of said injunctive order by a second petition for certiorari in the Supreme Court [fol. 234] of Florida raising the same legal questions as were raised in the first petition for certiorari and as are now raised for the third time by their assignments of error on this appeal (R. 150). This second petition for certiorari was denied by the Supreme Court on November 23, 1954 (R. 121).

Upon the filing of the mandate on said second petition for certiorari, in the lower court, the plaintiffs, appellees herein, filed a motion for summary final decree (R. 119), and after a hearing thereon, the Honorable C. E. Chillingworth, on January 14, 1955, entered the summary final decree (R. 138) from which the present appeal was taken (R. 148).

The defendants, appellants herein, filed a petition for rehearing on February 1, 1955, seeking to set aside this final decree, and said petition was denied by Judge Chillingworth on March 3, 1955 (R. 148). All these delays by the defendants, appellants herein, were apparently designed to delay the Florida case until they could get a decree in the Chancery Court in Delaware. The case in Delaware was filed by Elizabeth Donner Hanson, as executrix and trustee under the last will of Dora Browning Donner, deceased; she is a defendant in the Florida case and the plaintiff in the Delaware case. Said injunctive order enjoined her from proceeding with said complaint for declaratory decree in Delaware. Despite this injunctive order of the lower court and while this appeal has been pending in the lower court in Florida, she disobeyed said injunctive order and in August, 1955, called up her case in Delaware for hearing.

[fol. 235] Whereupon, appellee filed a petition in the Circuit Court of Palm Beach County, Florida, to have her adjudged in contempt of court for disobeying said injunctive order. The Honorable Jos. S. White, Judge of said court, issued a rule to show cause and after hearing, adjudged her to be in contempt of court, on September 12, 1955, but gave her the opportunity of purging herself of

such contempt by withdrawing her motion for summary judgment in the Delaware case until termination of this Florida case, "or until further order of court". No further order was obtained, and no appeal was taken to the Supreme Court of Florida from said contempt order. On the contrary, she purged herself of such contempt by filing her withdrawal of her motion for summary judgment in the Delaware court. A certified copy of the contempt proceedings and orders above mentioned are tendered for filing with this response.

Despite said injunctive order and her apparent obeyance of it, the said Elizabeth Donner Hanson, as said executrix and as trustee for her two children, has permitted said Delaware litigation which she filed, to continue to final decree and now in her "motion to remand", filed in the Supreme Court of Florida, she alleges in paragraph 7 thereof "that she is bound by the judgment of the Court of Chancery of the State of Delaware" and that she will "be bound by the determination of the Supreme Court of Delaware on appeal, said courts having jurisdiction of the trust assets". Such contentions and her actions in defiance of said injunctive order amount to trifling with the courts and judicial processes of the Sovereign State of [fol. 236] Florida.

She is a Florida citizen, acting as the executrix of the will of a Florida citizen, now in probate in the County Judge's Court in and for Palm Beach County, Florida. In paragraph 7 of her motion to remand, she seeks to cloud the issue by claiming that the trust assets are located in Delaware, but she fails to reveal that this Florida proceeding is not for the purpose of recovering said assets, but for the purpose of determining what passes under this Florida will. After this has been determined by the courts of Florida, proper suit will be filed to recover said trust assets or their value, but she is trying to preclude the Florida courts by getting the Delaware courts to determine whether the trust assets pass under the Florida will.

Wherefore, respondents pray that said motion to remand be denied.

Motion of Respondents to Dismiss "Motion to Remand"

The appellees move to dismiss the motion to remand on the following grounds:

(a) Said motion to remand shows by its own allegations that the Delaware declaratory decree in chancery was entered twelve months after the Florida declaratory decree in chancery was entered; that both courts are of similar jurisdiction, and that, therefore, the full faith and credit clause of the Constitution of the United States requires the Delaware courts to give full recognition to the Florida decree.

[fol. 237] (b) The record in this case shows that said motion to remand is seeking to deprive the Florida courts of jurisdiction of a matter over which the Delaware courts have no jurisdiction—the administration of an estate of a Florida citizen in Florida and the determination of what passes under her will.

(c) All property involved in this case is personal property and its situs for administration and for passing under the will of said deceased is in Florida.

Wherefore, respondents pray that this motion to dismiss be sustained.

C. Robert Burns, Redfearn & Ferrell, By /s/ D. H. Redfearn, Attorneys for Respondents.

[fol. 239] In the Supreme Court of Florida
June Term, A. D. 1956, Special Division A.

Case No. 27,622

Elizabeth Donner Hanson, individually and as executrix, et al., Appellants,

v.

Katherine N. R. Denckla, individually, et al., Appellees.

An Appeal from the Circuit Court for Palm Beach County, C. E. Chillingworth, Judge.

Caldwell, Pacetti, Robinson & Foster and Manley P. Caldwell for Elizabeth Don-er Hanson, Individually, as Execu-

trix of the Will of Dora Browning Donner, Deceased, as Guardian Ad Litem for Joseph Donner Winsor and Donner Hanson and William Donner Roosevelt, Individually; McCarthy, Lane & Adams, Edward McCarthy and William H. Foulk (Wilmington, Delaware) for Elizabeth Donner Hanson as Guardian Ad Litem for Joseph Donner Winsor and Donner Hanson, Appellants.

C. Robert Burns and Redfearn & Ferrell, for Appellees.

OPINION—Filed September 19, 1956.

HOBSON, *J.*:

This is an appeal by defendants from a summary final decree holding that assets of a trust created by Dora Donner during her lifetime passed under her will. Cross-assignments of error have been filed by the plaintiffs, who contend that the chancellor erred in holding that he had no jurisdiction over some of the defendants, the trustee and certain beneficiaries under the trust, who did not answer the complaint.

The essential facts of the case are not in dispute. Dora Donner died in Palm Beach, Florida, on November 20, 1952, leaving a will dated December 3, 1949, which was probated in Palm Beach County. She was formerly a citizen of Pennsylvania, but made her permanent home in Palm Beach County on or about January 15, 1944, and remained domiciled in Florida until she died.

[fol. 240] On March 25, 1935, the testatrix executed a trust instrument in which she named the Wilmington Trust Company, a Delaware corporation, as trustee. The trust instrument provided in part as follows:

> "Trustee shall pay over the net income of the trust fund unto Trustor, for and during the term of her natural life. Upon the death of Trustor Trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have

executed and delivered to Trustee, or failing such instrument, by her last Will and Testament, or in default of any such appointment then unto the then living issue of Trustor, per stirpes and not per capita."

The trust assets consisted entirely of intangible personalty.

On April 6, 1935, Mrs. Donner executed a power of appointment under the terms of the trust. On October 11, 1939, she executed a new power of appointment, amending the previous power.

On December 3, 1949 (the same day she executed her will, and while domiciled in Florida), Mrs. Donner executed an instrument entitled "Donner * First Power of Appointment" wherein she revoked all previous exercises of the power of appointment under the trust and ordered that certain sums be paid to a different set of beneficiaries.

On July 7, 1950, she executed an instrument entitled "Donner * Second Power of Appointment" amending the instrument of December 3, 1949. This was the last "power of appointment" the testatrix exercised before her death.

In her will, after making certain specific directions and bequests, the testatrix provided in part as follows:

[fol. 241] "FIFTH: All the rest, residue and remainder of my estate, real personal and mixed, whatsoever and wheresoever the same may be at the time of my death, *including any and all property, rights and interest over which I may have power of appointment which prior to my death has not been effectively exercised by me* or has been exercised by me in favor of my Executrix, I direct my Executrix to deal with as follows, namely:—"

[Here follow certain directions and the names of residuary legatees, plaintiff-appellees here.] (Italics supplied.)

The complaint for declaratory decree in this case was filed for the purpose of determining what passes under the residuary clause of the will quoted above. This determination, of course, requires a study of the trust agreement of March 25, 1935, and the powers of appointment exercised

thereunder, to determine whether or not such powers as the testatrix had were "effectively exercised" under the terms of the will. On this issue, the chancellor held in part:

> "Concerning the declaration of trust dated March 25, 1935, and particularly the power of appointment dated December 3, 1949, no present interest passed to any beneficiary other than the Trustor (Testatrix). It seems clear to me, from the authorities, that the power of appointment was testamentary in character and did not constitute a valid inter vivos trust appointment. As the appointment had only one subscribing witness, rather than two, as required in Florida, it did not constitute a valid testamentary disposition. Hence, the executrix should receive the assets and dispose of them agreeable to the will under which she was appointed."

[fol. 242] After this final decree was entered, a suit which had been brought in Delaware by Elizabeth Donner Hanson, as executrix and trustee under the Donner will (one of the appellants herein) to determine the validity of the trust agreement resulted in a summary judgment of the Court of Chancery of the State of Delaware in and for New Castle County, holding that the trust was valid. An appeal from this judgment is pending in Delaware but, so far as the record here before us shows, has not yet been determined.

Appellants have lodged with us a copy of the Delaware chancellor's opinion and judgment and, on the basis thereof, have moved to remand the instant case with directions to dismiss it, taking the position that the Delaware judgment is dispositive of the main issue raised on this appeal.

We shall first consider the contention of appellants that the circuit court of Palm Beach County erred in holding the trust and the powers of appointment exercised thereunder invalid as testamentary in character. As a preliminary inquiry, it is necessary to determine whether or not jurisdiction existed in the courts of Florida to pass upon the validity of these instruments.

There can be no doubt that the court below possessed substantive jurisdiction to determine this issue. Jurisdiction existed by virtue of the will, which had been duly probated in Florida, the testatrix' domiciliary state. Reference having been made in the will, as we have seen, to powers of appointment, and the question of effective exercise thereof having been properly raised, the chancellor below had no alternative but to examine the trust instrument and documents executed thereunder and declare them valid or invalid. This is to be distinguished from a case wherein questions of administration or validity of a purported inter vivos trust arise absent a will or any reference therein. Cf. *Wilmington Trust Co.* v. *Wilmington Trust Co.*, Del., 24 A. 2d 309, wherein the settlor had executed a will "making no reference whatever to the power of appointment conferred on him by the [previously executed] trust agreement . . ." and it was held that the Delaware courts had jurisdiction to determine the validity of [fol. 243] trust powers, although the settlor died a domiciliary of another state. In the case now presented, it would have been an abdication or abandonment of jurisdiction, which we would have been obliged to correct, if the chancellor below had failed to answer the question which was duly brought before him for adjudication.

The next question is the source of the applicable law to test the validity of the attempted trust disposition. The trustee, Wilmington Trust Company, is a Delaware corporation with its principal place of business in Delaware. Securities representing the intangible personalty which forms the corpus of the trust are also located in Delaware. The settlor was domiciled in Pennsylvania when she executed the original trust instrument. The first two "powers of appointment", now revoked, were executed while the settlor was domiciled in Pennsylvania. But these considerations alone are insufficient to persuade us that the law of either Delaware or Pennsylvania is applicable, for reasons which will hereinafter appear.

Assuming, for the moment, that this was an inter vivos trust, the only exercises of the power of appointment which could have been intended to create an interest to be enjoyed at the settlor's death were those reflected in the docu-

ments of 1949 and 1950. The settlor obviously intended these documents, if any, to make the controlling disposition, for she revoked all previous exercises of the power and even called the 1949 and 1950 papers the "first" and "second" power of appointment respectively, although she had previously executed similar instruments. The chancellor in Delaware, in expressing his opinion that the trust was valid under Delaware law, sanctioned payment to the remaindermen named in these last two powers of appointment. In the last analysis we, too, are concerned with the interests of these remaindermen in our inquiry as to whether or not the instruments which created their interests were effective to shift the trust property out of the estate of the testatrix. We do not question the validity of the beneficial life estate reserved by the settlor. [fol. 244] It is urged upon us that the remaindermen possessed during the life of the settlor a present right of future enjoyment of the trust property. In making this argument, appellants state in part in their brief that:

> " . . . since the right to amend is specifically reserved in the Trust Agreement of March 25, 1935, *each appointment should be construed as an amendment to and a republication of the original agreement.* Therefore, the trust agreement and appointments thereunder must always be construed together." (Italics supplied.)

In *Henderson* v. *Usher*, 118 Fla. 688, 160 So. 9, we observed that an inter vivos trust usually has its situs at the residence of the creator of the trust, and we were considerably influenced in our consideration of this principle by the case of *Swetland* v. *Swetland*, 105 N. J. Eq. 608, 149 A. 50; Id., 107 N. J. Eq. 504, 153 A. 907, which we viewed as "one of the leading cases in this country on the question". In the *Swetland* case the settlor had amended the trust, but had been domiciled in New Jersey both at the time of his execution of the original trust agreement and the amendment thereto. It was held that New Jersey law applied to test both agreements. The court in the *Swetland* case rejected the contention that the applicable law as to the trust necessarily followed the settlor wherever he might be domiciled after the trust was executed, and it is

unnecessary for us to express any opinion regarding this principle. It is sufficient to observe that in the instant case the last effective acts, if any there were, of the settlor to establish remainder interests under the trust were accomplished while she was a Florida domiciliary, and we consider the last powers of appointment as a republication of the original trust instrument, or as if the trust instrument had been executed while the settlor was domiciled in Florida. We consider this a far more realistic interpretation of these instruments than if we were to rule that the last powers of appointment should be construed to relate back to the date upon which the original [fol. 245] trust agreement was executed, because the effect of a "relation-back" view would be to establish an artificially early date for interests which were obviously not intended to be created by the settlor until much later. Hence we must consider the validity of the trust, and the remainder interests it sought to create, under Florida law, *Henderson* v. *Usher, supra,* 118 Fla. 688, 160 So. 9. Compare the rule sustaining the power of the domiciliary state to tax, and apply its tax law to, the exercise of a power to dispose of intangibles, although the trust fund and trustee are outside the state. *Graves* v. *Schmidlapp,* 315 U. S. 657, 86 L. Ed. 1097; *Bullen* v. *Wisconsin,* 240 U. S. 625, 60 L. Ed. 830.

The logic of the foregoing analysis is strongly buttressed in the instant case by the fact that the settlor chose, after she had come to Florida, which was to be her last domicile, to make an integrated pattern of arrangements for the disposition of her property. At this period of her life she desired to make final exercise of whatever powers she might have had under the earlier arrangement but was careful to provide in her will for the possible ineffectiveness of such exercise of power, making an unquestionably valid testamentary disposition to settle her entire estate if the doubtful powers of appointment failed.

Having decided that Florida law applies, we are next obliged to apply it. The validity of an attempted inter vivos trust such as this is a matter of first impression in this state. The trust instrument provided, as we have seen, that the settlor would receive all of the net income for life.

The settlor reserved to herself the right to amend or revoke the trust agreement in whole or in part at any time. Many powers of the trustee could ordinarily be exercised by it only upon the written direction of, or with the written consent of, the "adviser" of the trust. These powers were the following:

> "(b) To sell at public or private sale, exchange for like or unlike property, convey, lease for terms longer or shorter than the trust, and otherwise dispose [fol. 246] of any or all property, real or personal, held in the trust fund, for such price and upon such terms and credits as Trustee may deem proper.
>
> "(c) To invest the proceeds of any such sale or sales, and any other money available for investment, in such stocks, bonds, notes, securities and/or other income producing property as may be deemed appropriate for this trust fund, irrespective of the rules of investment applying to trustees under any present or future laws of the State of Delaware or elsewhere.
>
> * * * * * * *
>
> "(e) To participate in any plan or proceeding for protecting or enforcing any right, obligation or interest arising from any stock, bond, note or security held in the trust fund, or for reorganizing, consolidating, merging or adjusting the finances of any corporation issuing the same, to accept in lieu thereof any new or substituted stocks, bonds and/or securities, to pay any assessment or any expense incident thereto, and to do any other act or thing that Trustee may deem necessary or advisable in connection therewith."

As "advisor" the settlor named her husband or "such other person or persons as trustor may nominate in writing delivered to trustee during her lifetime". Finally, and very significantly, the settlor reserved to herself the power of appointment, which we have discussed above, with a view to naming beneficiaries to take remainder interests in the trust after her death.

Although any of these reservations of power in the settlor, standing alone, might not have been enough to

render the trust invalid (cf. *Williams* v. *Collier*, 120 Fla. 248, 162 So. 868, wherein we upheld a revocable trust reserving a life interest to the settlor, with remainder payable to named grandchildren) the cumulative effect of [fol. 247] the reservations was such that the relationship established divested the settlor of virtually none of her day-to-day control over the property or the power to dispose of it on her death, and the trust was illusory. See *Burns* v. *Turnbull*, 294 N. Y. 889, 62 N. E. 2d 785; *In re Tunnell's Estate*, 325 Pa. 554, 190 A. 906; *In re Shapley*, 353 Pa. 499, 46 A. 2d 227; *Hurley's Estate*, 17 Pa. D. & C. 637; *Warsco* v. *Oshkosh Savings & Trust Co.*, 183 Wis. 156, 196 N. W. 829; *Steinke* v. *Sztanka*, 364 Ill. 334, 4 N. E. 2d 472. In Scott, Trusts and the Statute of Wills, 43 Harv. L. R. 521, 529, the author states:

> "Suppose that the settlor reserves not merely a life interest and a power to revoke the trust in whole or in part and to modify the trust, but reserves also a power to control the trustee in the administration of the trust. In such a case, there is authority to the effect that the trust is in substance testamentary and is invalid unless declared in an instrument executed in accordance with the requirements of the Statute of Wills."

Another common prineiple is reflected in Restatement of Trusts, Sec. 56, which reads as follows:

> "Where the owner of property purports to create a trust inter vivos but no interest passes to the beneficiary before the death of the settlor, the intended trust is a testamentary trust and is invalid unless the requirements of the statutes relating to the validity of wills are complied with."

Appellants contend that Illustration 8 under Subsection g. of this section is "exactly our case". This illustration reads as follows:

> "8. A transfers certain securities to B in trust to pay the income to A for life and upon A's death to convey the securities to such person as may be designated in

a letter to be delivered by A to B on the following [fol. 248] day. On the following day A delivers a letter to B designating C as the person entitled to receive the securities on A's death. A valid trust for C is created, since an interest passes to C during the life of A."

The above illustration represents the instant trust in some particulars, but is an oversimplification of the facts before us. It relates to a single exercise of a power of appointment, rather than frequently revoked and amended exercises of power, such as appear in the case before us, which would demonstrate that the settlor considered the appointments to be ambulatory in nature and exactly like successive wills or codicils in their operation. The illustration given, moreover, does not consider the element of control, which we have discussed above. This is treated in Sec. 57 of the Restatement, Subsection g. of which reads in part as follows:

"If the settlor reserves a beneficial life estate and power to revoke or modify the trust and such power to control the trustee as to the details of the administration of the trust that the trustee is his agent, the intended disposition so far as it is intended to take effect after his death is invalid unless the requirements of the Statute of Wills are complied with, but the intended trust is valid so far as the beneficial life estate of the settlor is concerned."

Illustration 5 reads as follows:

"5. A, the owner of shares of stock, delivers the certificates to the B Trust Company to hold and deal with as custodian, to receive the income and pay it over to A, and with power to sell the shares and to reinvest the proceeds. In order to carry out these purposes the shares are registered in the name of the trust company. A writes a letter to the trust company directing it to convey the shares on A's death to C, [fol. 249] unless A should otherwise direct. A dies. The intended disposition in favor of C is testamentary,

and C is not entitled to the shares unless the requirements of the Statute of Wills are complied with."

True it is that in the situation posed in Illustration 5 the action taken by A, the settlor, is somewhat less formal than the action taken by the settlor herein, and while this is a circumstance which would tend to uphold the validity of the instant trust, we do not consider it controlling when weighed against the multiple reservations of power we have discussed.

We reemphasize that we do not, and need not, hold that the reservation of the power of appointment, or any other factor standing alone, would suffice to invalidate the remainder interests sought to be created under this trust. It is enough to observe that if, as to the remaindermen, this trust is not invalid as an agency agreement, and testamentary as the court below found, it is difficult to understand what further control could be retained by a settlor to produce this result, and the principles to which we have alluded above would lose their meaning. We have been shown no error in the chancellor's ruling on this aspect of the case, which accordingly must be affirmed.

We next consider the contention made on the cross-appeal that the chancellor erred in ruling that he lacked jurisdiction over the persons of certain absent defendants, summoned to appear by constructive service of process. These defendants were the trustee and persons who would benefit under the last power of appointment executed under the trust, and against the will. In *Henderson* v. *Usher*, supra, 160 So. 9, we upheld constructive service of a citizen of New York, although the trust "res", consisting entirely of intangible personalty, was physically located in New York, and the trust was administered there by the Chase National Bank of New York, as trustee. We held that constructive service was valid in that state of the record because substantive jurisdiction existed in the Florida court by virtue of construction of a will, which was also involved, the testator having been domiciled in Florida. We observed that it was not essential that the [fol. 250] assets of the trust be physically in this state in order that constructive service be binding upon a non-

Dora Browning Donner, deceased, filed July 22, 1955, be and the same hereby is dismissed with prejudice.

(5) That the cross-claims of defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla against Delaware Trust Company and Wilmington Trust Company filed July 22, 1955 be and the same hereby are dismissed with prejudice.

(6) That pursuant to Rule 55(b) and in accordance with [fol. 208] the motion of Edwin D. Steel, Jr., guardian *ad litem* as aforesaid, filed September 22, 1955 and with the motion of Wilmington Trust Company and Delaware Trust Company filed February 17, 1955, judgment by default with respect to all matters, property rights and interests, legal and equitable, decreed, adjudicated and determined by Paragraph (2) (including subparagraphs (a), (b), (c) and (d) thereof) and by Paragraph (3) of this Judgment is granted against the following named defendants for the reason that they have failed to appear and answer the complaint herein on or before September 10, 1954, pursuant to the orders of the Court herein entered on July 29, 1954 and August 12, 1954 and have not appeared or answered up to this time:

Katherine N. R. Denckla
Hobe Sound, Florida

Elwyn L. Middleton, Guardian of the property of Dorothy B. R. Stewart, a mentally ill person,
Harvey Building
West Palm Beach, Florida

Bryn Mawr Hospital
Bryn Mawr, Pennsylvania

Miriam V. Moyer
1710 Fidelity-Philadelphia Bldg.
Philadelphia, Pa.

James Smith
221 Williams Street
Rosemont, Pa.

Walter Hamilton
Rosemont, Pa.

[fol. 209] Dorothy A. Doyle
5108 Penn Street
Philadelphia 24, Pa.

Ruth Brenner
4224 Osage Avenue
Philadelphia 4, Pa.

Mary Glackens
4930 Westminster Avenue
Philadelphia 31, Pa.

Louisville Trust Company, as Trustee for Benedict H. Hanson and as Trustee under Agreements with William H. Donner,
Louisville, Kentucky

Benedict H. Hanson
510 Park Avenue
New York, New York

William Donner Roosevelt
2540 South Ocean Boulevard
Palm Beach, Florida

John Stewart
Beechwood Road
Rosemont, Pa.

(7) That (1) the Motion of Robert B. Walls, Jr., guardian *ad litem* of Dorothy B. R. Stewart, filed February 18, 1955, to strike motions of Wilmington Trust Company and Delaware Trust Company for default judgment under Rule 55(b), (2) the Motion of Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla filed February 23, 1955 to strike motion of Wilmington Trust Company and Delaware Trust Company for default judgment under Rule 55(b), (3) the Motion of Robert B. Walls, Jr., guardian *ad litem* of Dorothy B. R. Stewart filed September 22, 1955 to strike motion of Edwin D. Steel, Jr., guardian *ad litem* as aforesaid, for default judgment under Rule 55(b), and (4) the Motion of Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning [fol. 210] Denckla filed September 27, 1955 to strike Motion

of Edwin D. Steel, Jr., guardian *ad litem* as aforesaid, for default judgment under Rule 55(b), be and the same hereby are respectively denied.

(8) That upon application of any interested party this Court will determine what counsel fees, expenses and disbursements shall be allowed out of any *res* before this Court, and jurisdiction is hereby reserved for that purpose.

/s/ D. L. Herrmann
Acting Vice Chancellor
pursuant to Order of Chancellor
entered herein on July 19, 1955.

APPROVED AS TO FORM:

.....
Attorneys for Plaintiff

/s/ C. S. Layton
Attorney for Wilmington
Trust Company

/s/ David F. Anderson
Attorney for Delaware
Trust Company

/s/ Edwin L. Steel, Jr.
Guardian *ad litem* for
Joseph Donner Winsor,
Curtin Winsor, Jr.
and Donner Hanson.

.....
Guardian *ad litem* for
Dorothy B. R. Stewart
and William Donner Denckla

.....
Attorney for Dora Stewart
Lewis, Mary Washington
Stewart Borie and Paula
Browning Denckla.

[fol. 211] STATE OF DELAWARE,
KENT COUNTY, ss.:

I, T. E. Townsend, Jr., Clerk of the Supreme Court of the State of Delaware, do hereby certify that the foregoing is a true and correct copy of Item #69 in the Record in the cause

Dora Stewart Lewis, et al., :

v. : No. 3, 1956

Elizabeth Donner Hanson :

as the same remains on file and of record in said Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Dover this 6th day of March, A.D. 1956.

/s/ T. E. Townsend, Jr.
Clerk of the Supreme Court.

(Seal)

[fol. 212] EXHIBIT C TO MOTION TO REMAND

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 531

ELIZABETH DONNER HANSON, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased, Plaintiff,

v.

WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee, et al., Defendants.

NOTICE

To: DAVID F. ANDERSON, ESQUIRE,
Attorney for Defendant,
Delaware Trust Company, Trustee,
948 Delaware Trust Building
Wilmington, Delaware;

CALEB S. LAYTON, ESQUIRE,
Attorney for Defendant,
Wilmington Trust Company, Trustee
4072 duPont Building
Wilmington, Delaware;

ROBERT B. WALLS, ESQUIRE,
Guardian ad litem for Dorothy
B.R. Stewart and William
Donner Denckla,
500 Industrial Trust Building
Wilmington, Delaware;

EDWIN D. STEEL, JR., ESQUIRE,
Guardian ad litem for Joseph
Donner Winsor, Curtin Winsor,
Jr. and Donner Hanson,
3108 duPont Building
Wilmington, Delaware;

WILLIAM H. FOULK, ESQUIRE,
WILLIAM DUFFY, JR., ESQUIRE,
Attorney's for Plaintiff,
228 Delaware Trust Building
Wilmington, Delaware:

[fol. 213] PLEASE TAKE NOTICE that the attached Motion of Defendants, Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla, for a new trial will be brought on to be heard before the acting Vice-Chancellor of the State of Delaware, the Honorable Daniel L. Herrmann, in his chambers at eleven o'clock in the forenoon, on Monday, January 23, 1956, or at such other time as may be convenient to the Court.

/s/ ARTHUR G. LOGAN
Arthur G. Logan

Dated: January 19, 1956.

/s/ Aubrey B. Lank
Aubrey B. Lank
Attorneys for Defendants,
Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla,
400 Continental American Building,
Wilmington, Delaware.

[fol. 214] In the Court of Chancery of the State of Delaware in and for New Castle County

Civil Action No. 531

Elizabeth Donner Hanson, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased, Plaintiff,

v.

Wilmington Trust Company, a Delaware corporation, as Trustee, et al., Defendants.

Motion for New Trial

Come now, Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla, by and through their attorneys, Arthur G. Logan and Aubrey B. Lank, and pursuant to Rule 59 of the Rules of the Court of Chancery of the State of Delaware move this Court for a new trial and as grounds therefor say:

1. That this Court has failed to give full faith and credit to a judgment of the Circuit Court of Palm Beach County, Florida, known as "Katherine N. R. Denckla, individually et al., Plaintiffs, vs. Wilmington Trust Company, a Delaware corporation, et al., Defendants" in Chancery number 31,980, dated January 14, 1955, in ac-

cordance with Article 4, Section 1 of the Constitution of the United States.

[fol. 215] 2. That this Court erred as a matter of law in holding that any present interest passed to the beneficiaries under the Agreement of March 25, 1935, between Dora Browning Donner and Wilmington Trust Company, and the powers of appointment purportedly executed in conformity therewith.

3. That this Court erred as a matter of law in finding that the doctrine of collateral estoppel does not apply against all the appearing parties to this action.

4. That this Court erred as a matter of fact and law in holding the Agreement of March 25, 1935 a valid trust agreement when both in fact and law said Agreement was and is an agency agreement by reason of the controls retained by the alleged settlor or trustor, Dora Browning Donner, and by reason of the controls which she reserved through the so called advisor to this alleged trust.

5. That this Court erred as a matter of fact in holding that the relationship between the so called settlor or trustor, Dora Browning Donner, and her first advisor was not an existing agency at the time of the execution of the Agreement on March 25, 1935, in that the affidavit of C. Kenneth Baxter dated December 27, 1954, shows that he was, prior to and on March 25, 1935, an investment advisor to William Hanson Donner and members of his family, which included Dora Browning Donner, and companies [fol. 216] owned or controlled by them.

6. That this Court erred as a matter of law in granting the Defendants, Wilmington Trust Company, Delaware Trust Company and Edwin D. Steel, Jr., Esquire, guardian ad litem for Joseph Donner Winsor, Curtin Winsor, Jr. and Donner Hanson, Motions for Summary Judgment in that there is a factual dispute as to whether an agency existed between Dora Browning Donner and the first settlor and whether it continued after the alleged trust was entered into on March 25, 1935.

7. That this Court erred as a matter of law in holding that a settlor or trustor must consent to any surrender

of duties between a trustee and an advisor pertaining to the operation of the trust, whereas here the advisor and trustee were both the agents of the settlor.

8. That this Court erred as a matter of law in holding that the alleged trustor intended to create a valid trust on March 25, 1935, as such intent must be read from the trust instrument itself and such intent is lacking in the alleged trust agreement of March 25, 1935.

/s/ Arthur C Logan
Arthur G. Logan
/s/ Aubrey B. Lank
Aubrey B. Lank
Attorneys for Defendants,
Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla,
400 Continental American Building,
Wilmington, Delaware.

Dated: January 19, 1956.

[fol. 217] State of Delaware,
Kent County, *ss.*:

I, T. E. Townsend, Jr., Clerk of the Supreme Court of the State of Delaware, do hereby certify that the foregoing is a true and correct copy of Item #70 of the Record in the cause

Dora Stewart Lewis, et al., :
v. : No. 8, 1956
Elizabeth Donner Hanson :

as the same remains on file and of record in said Court.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Dover this 6th day of March, A.D. 1956.

/s/ T. E. Townsend, Jr.
Clerk of the Supreme Court.

(Seal)

[fol. 218] EXHIBIT D TO MOTION TO REMAND

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY
Civil Action No. 531

ELIZABETH DONNER HANSON, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased, Plaintiff,

vs.

WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee, et al., Defendants.

ORDER

AND NOW, TO WIT: this 25th day of January, A.D. 1956, the Motion of Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla, For New Trial pursuant to Rule 59 of the Rules of the Court of Chancery of the State of Delaware, filed herein on January 20, 1956, having come on to be heard, IT IS

ORDERED, ADJUDGED and DECREED that the said Motion For New Trial filed herein by Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla, be and the same hereby is denied.

/s/ D. L. Herrmann
Judge

[fol. 219] APPROVED AS TO FORM:

/s/ David F. Anderson
Attorney for Defendant,
Delaware Trust Company, Trustee.

/s/ C. S. Layton
Attorney for Defendant,
Wilmington Trust Company, Trustee.

/s/ R. B. Walls, Jr.
Guardian ad litem for Dorothy B. R. Stewart and William Donner Denckla.

/s/ E. D. Steel, Jr.
Guardian ad litem for Joseph Donner Winsor, Curtin Winsor, Jr. and Donner Hanson.

.....

Attorney for Plaintiff.

/s/ Arthur G. Logan
Attorney for Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla.

[fol. 220]

STATE OF DELAWARE,
KENT COUNTY, ss.:

I, T. E. Townsend, Jr., Clerk of the Supreme Court of the State of Delaware, do hereby certify that the foregoing is a true and correct copy of Item #71 of the Record in the cause

Dora Stewart Lewis, et al., :
v. : No. 8, 1956
Elizabeth Donner Hanson :

as the same remains on file and of record in said Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Dover this 6th day of March, A.D. 1956.

/s/ T. E. Townsend, Jr.
Clerk of the Supreme Court.

(Seal)

[fol. 221] EXHIBIT E TO MOTION TO REMAND

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

No. 8, 1956.

Appeal from the Court of Chancery of the State of Delaware in and for New Castle County, Civil Action No. 531.

PRAECIPE

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE and PAULA BROWNING DENCKLA,

Defendants Below, Appellants,

vs.

ELIZABETH DONNER HANSON, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased,

Plaintiff Below, Appellee,

WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee under three separate Agreements, (1) and (2) with William H. Donner dated March 18, 1932 and March 19, 1932, and (3) with Dora Browning Donner dated March 25, 1935,

Defendant Below, Appellee,

DELAWARE TRUST COMPANY, a Delaware corporation, as Trustee under three separate Agreements, (1) with William H. Donner dated August 6, 1940, and (2) and (3) with Elizabeth Donner Hanson, both dated November 26, 1948,

Defendant Below, Appellee,

KATHERINE N. R. DENCKLA,

Defendant Below, Appellee,

ROBERT B. WALLS, ESQUIRE, Guardian ad litem for Dorothy B. R. Stewart and William Donner Denckla,

Defendant Below, Appellee,

[fol. 222] ELWYN L. MIDDLETON, Guardian of the property of Dorothy B. R. Stewart, a mentally ill person,
Defendant Below, Appellee,

EDWIN D. STEEL, JR., ESQUIRE, Guardian ad litem for Joseph Donner Winsor, Curtin Winsor Jr., and Donner Hanson,
Defendant Below, Appellee,

BRYN MAWR HOSPITAL, a Pennsylvania corporation, MIRIAM V. MOYER, JAMES SMITH, WALTER HAMILTON, DOROTHY A. DOYLE, RUTH BRENNER and MARY GLACKENS,
Defendants Below, Appellees,

LOUISVILLE TRUST COMPANY, a Kentucky corporation, as Trustee for Benedict H. Hanson, and as Trustee under agreements with William H. Donner,
Defendant Below, Appellee,

WILLIAM DONNER ROSSEVELT, JOHN STEWART and BENEDICT H. HANSON,
Defendants Below, Appellees,

To:

T. EDGAR TOWNSEND
Clerk of the Supreme Court of the State of Delaware
Dover, Delaware:

Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla, Defendants Below, Appellants, hereby appeal from all of the Judgment of the Court of Chancery of the State of Delaware in and for New Castle County dated the 13th day of January, A.D. 1956, and also appeal from all of the Order of said Court dated the 25th [fol. 223] day of January, A.D. 1956, denying the motion of these appellants for a new trial, ~~both~~ of which were entered in Civil Action Number 531 and hereby direct you to issue writs, to be served either personally or by registered mail, viz., (1) a writ (to be called the citation) directing the appellees to defend the cause, and (2) a writ (to be called the writ of error), directed to the clerk of the court below, re-

quiring the return to the Supreme Court of the State of Delaware of the record of the cause below. There are set forth below the names and addresses of the attorneys of record for the appellees who have appeared by attorneys and the last known post office address of such appellees who have no attorney of record.

William H. Foulk, Esquire,
William Duffy, Jr., Esquire,
Attorneys for Plaintiff,
Elizabeth Donner Hanson,
228 Delaware Trust Building
Wilmington, Delaware;

Caleb S. Layton, Esquire,
Attorney for Defendant,
Wilmington Trust Company, Trustee,
4072 duPont Building
Wilmington, Delaware;

David F. Anderson, Esquire,
Attorney for Defendant,
Delaware Trust Company, Trustee,
948 Delaware Trust Building
Wilmington, Delaware;

Robert B. Walls, Esquire,
Guardian ad litem for Dorothy
B. R. Stewart and William Donner Denckla,
500 Industrial Trust Building,
Wilmington, Delaware;

[fol. 224] Edwin D. Steel, Jr., Esquire,
Guardian ad litem for Joseph Donner Winsor,
Curtin Winsor, Jr., and Donner Hanson,
3108 duPont Building
Wilmington, Delaware;

Katherine N. R. Denckla
Hobe Sound
Florida

Elwyn L. Middleton, Esquire,
Guardian of the property of
Dorothy B. R. Stewart, a mentally ill person,
Harvey Building
Post Office Box 1391
West Palm Beach, Florida;

Bryn Mawr Hospital
Bryn Mawr, Pennsylvania;

Miriam V. Moyer
1710 Fidelity-Philadelphia Bldg.
Philadelphia, Pennsylvania;

James Smith
221 Williams Street
Rosemont, Pennsylvania;

Walter Hamilton
Rosemont, Pennsylvania;

Dorothy A. Doyle
5108 Penn Street
Philadelphia 24, Pennsylvania;

Ruth Brenner
4224 Osage Avenue
Philadelphia 4, Pennsylvania

Mary Glackens
4930 Westminster Avenue
Philadelphia 31, Pennsylvania

Louisville Trust Company,
Trustee for Benedict H. Hanson,
and Trustee under agreements
with William H. Donner,
Louisville, Kentucky;

[fol. 225] William Donner Roosevelt
2540 South Ocean Blvd.
Palm Beach, Florida;

John Stewart
Beechwood Road
Rosemont, Pennsylvania;

Benedict H. Hanson
510 Park Avenue
New York City, New York.

Dated: February 14, 1956.

/s/ Arthur G. Logan
Arthur G. Logan

/s/ Aubrey B. Lank
Aubrey B. Lank

Attorneys for Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla, Defendants Below, Appellants,
400 Continental American Building
Wilmington, Delaware.

[fol. 226] STATE OF DELAWARE,
KENT COUNTY, *ss.*:

I, T. E. Townsend, Jr., Clerk of the Supreme Court of the State of Delaware, do hereby certify that the foregoing is a true and correct copy of Praecipe in the cause

Dora Stewart Lewis, et al., :
v. : No. 8, 1956
Elizabeth Donner Hanson :

as the same remains on file and of record in said Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Dover this 6th day of March, A.D. 1956.

/s/ T. E. Townsend, Jr.
Clerk of the Supreme Court.

(Seal)

[fol. 228] IN THE SUPREME COURT OF THE STATE OF FLORIDA

[Title omitted]

RESPONSE OF APPELLEES TO APPELLANTS' "MOTION TO REMAND"; MOTION OF APPELLEES TO DISMISS SAID "MOTION TO REMAND"—Filed March 27, 1956.

Said motion to remand, in paragraph 7 thereof, refers to movant as "petitioner" and also as "appellants". Movants thus recognize that their motion to remand is a petition raising issues of both fact and law. For this reason appellees present this response and motion to dismiss for filing, and ask the court to consider the same as part of the record in this case.

1.

Respondents admit the allegations contained in paragraph 1 of said motion to remand.

2.

[fol. 229] Respondents admit the allegations contained in paragraph 2 of said motion to remand but allege that the complaint for declaratory decree mentioned therein, filed in Delaware, was filed approximately six months after the complaint for declaratory decree was filed in Florida on January 22, 1954. Elizabeth Donner Hanson, as executrix and as trustee under the will of Dora Browning Donner, deceased, filed said complaint in Delaware only after she had lost her first petition for certiorari in this case in Florida. Respondents allege that said proceeding in Delaware was merely a sham and was filed by the movant herein in order to try to deprive the Florida courts of jurisdiction and for the purpose of trying to lose said case in Delaware and then claim in the Florida courts that she could not recover said trust assets. If she can lose the case in Delaware and win the case in Florida, then her two children will get the benefits of most of said trust assets instead of the appellants (R 39). This illustrates the inconsistent position which she occupies in this case, and why she is not an impartial executrix and trustee and why she could not have initiated the Delaware case in good faith.

resident where the problem presented to the court was to adjudica , inter alia, the status of the securities incorporated in the trust estate and the rights of the non-resident therein. It is entirely consistent with the *Henderson* case to hold, as we do, that the court below erred in ruling that it lacked jurisdiction over the persons of the absent defendants. With this view of the case, we need not consider the contention of cross-appellees that the absent defendants are necessary parties under *Martinez v. Balbin*, Fla., 76 So. 2d 488.

Finally, we mention again the motion to remand on the basis of the decree of the Delaware court. Since we hold that we have jurisdiction of the matter presented, and that Florida law is exclusively applicable thereto, this motion must be denied.

Affirmed in part; reversed in part.

Terrell, Acting Chief Justice, Thornal and O'Connell, *JJ.*, Concur.

[fol. 252] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

PETITION FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING—Filed September 28, 1956

Come now appellants, by their undersigned counsel, and petition the Court to extend the time within which they may file a petition for rehearing, 15 days, to October 19, 1956; and as grounds would show the court that, after all counsel for appellants had delegated to an associate the preparation of such petition, and the necessary preliminary research, such associate became ill, and in view of the involved questions of Constitutional Law, Full Faith and Credit, Conflicts and Jurisdiction, if possible at all, it would be possible only with undue personal inconvenience, or default on other commitments, for appellants' counsel now to review the authorities, complete and file such petition within the 15-day period allowed by Rule 45.

And your petitioners will ever pray.

Caldwell, Pacetti, Robinson & Foster, /s/ Manley P. Caldwell, 501 Harvey Building, West Palm Beach, Florida.

[fol. 253] /s/ William H. Foulk, 228 Delaware Trust Building, Wilmington, Delaware.

McCarthy, Lane & Adams, /s/ Edw. McCarthy, 423 Atlantic National Bank Bldg., Jacksonville 2, Florida.

Duly sworn to by Edward McCarthy, jurat omitted in printing.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 255] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR REHEARING—September 28, 1956

Attorneys for appellants have filed a petition for extension of time beyond that allowed by the Rules of Court in which to file petition for rehearing in the above case and the same having been considered, it is ordered that appellants be and they are hereby allowed ten days additional time to that allowed by the Rules in which to file such petition.

[fol. 257] IN THE SUPREME COURT OF FLORIDA
SPECIAL DIVISION A.

[Titie omitted]

PETITION FOR REHEARING—Filed October 13, 1956

Come now the Appellants, the answering defendants in the Circuit Court for Palm Beach County, by their undersigned attorneys, and petition the Court for rehearing and reconsideration of the decision rendered on September 19, 1956, upon the following grounds:

1. The Court erred in holding that the Circuit Court of Palm Beach County had jurisdiction over the persons of the non-appearing and non-answering defendants for the following reasons:

(a) Wilmington Trust Company, one of the non-appearing and non-answering defendants herein, was trustee of the assets which form the subject matter of this litigation until it transferred said assets to the persons entitled thereto under the power of appointment dated December 3, 1949. Delaware Trust Company was one of the recipients under said power. Defendants, Wilmington Trust Company and Delaware Trust Company, are cor-
[fol. 258] porations organized and operating as trust companies under the laws of the State of Delaware; neither of said corporations has any place of business in the State of Florida; nor has either of them transacted any business in the State of Florida; nor does either of them have any officers or agents in the State of Florida; nor has either of them been served with process in the State of Florida or appeared in this litigation. Both of said trustees are necessary and indispensable parties to the final and effective determination of this litigation.

(b) None of the other recipients named in the appointment dated December 3, 1949 (other than Elizabeth Donner Hanson, as Trustee under the Will of Dora Browning Donner) are residents of the State of Florida, nor has any of them been served personally with process in the State of Florida or appeared in this litigation. All of said parties are necessary and indispensable parties to the final and effective determination of this litigation.

(c) Three persons who qualified under the appointment dated December 3, 1949 (Dorothy Doyle, Mary Glackens and Ruth Brenner) were not even named as parties to the litigation; nor has any of them been served personally or otherwise; nor has any of them appeared in this litigation. These parties are also necessary and indispensable parties to the final and effective determination of this litigation.

(d) The assets which are the subject matter of this litigation are not now nor have they ever been in the State

of Florida nor have they been brought constructively into [fol. 259] the Courts of this State, and no legal basis exists for constructive service upon any of the non-appearing and non-answering defendants.

(e) Absent the parties and the trust res, the attempt at jurisdiction over the non-appearing, non-consenting and non-answering defendants violates the Fourteenth Amendment to the Constitution of the United States.

The Circuit Court's jurisdiction under the organic law of the State of Florida over the estate of the trustor, of matters of probate and the construction of her will where a patent ambiguity exists and over the executrix thereof does not confer jurisdiction to determine rights to assets held in trust in another jurisdiction and under the control of trustees who are not in this State. For example, the Circuit Court could not have jurisdiction to test the validity of a contract for the payment of money where the defendant lived outside of Florida merely because the amount recoverable under the contract was the subject of a specific legacy.

In *Findlay* v. *F. E. C. Railway Company* (D. C. Fla. 1933) 3 Fed. Sup. 393, Affirmed (CCA 5) 68 Fed. 2d 540, the Court held, contrary to the holding of this Court, that shares of stock of Florida corporations held by nonresident trustees under Mrs. Flagler's Will, which was probated in Florida, were not constructively within the State of Florida so as to authorize a decree in rem, and hence the Will could not be construed as to those shares. The Court stated:

> "This Court is without power to construe the will, or to adjudicate by a decree in rem the rights, if any, of the railway company in the trust estate, as against these nonresident defendants, or against other nonresident beneficiaries under the will.
>
> [fol. 260] "Even if the residual estate is an equitable asset of the railway company, and even if plaintiffs bonds, through the trust deed, are a lien upon it, there is no res in this jurisdiction, there is no basis upon which this court may properly direct the conduct of the nonresident trustees with respect to the trust

estate. Any attempt to do so would be a pure usurpation of power."

See also *Lines* v. *Lines* (Pa. 1891) 21 Atl. 809 holding that "a court of equity in this State (Pennsylvania) cannot by its decree take [property] out of the hands of its custodian there (New York) and transfer it to executors in this State." To the same effect see *Martin* v. *Martin* (Pa. 1906) 63 Atl. 1026; *Sadler* v. *Industrial Trust Co.* (Mass. 1951) 97 N.E. 2d 169 held:

> " * * * The situs of the trust is in Rhode Island, where are found the trustee and the trust property, notwithstanding the residence of the beneficiaries in this Commonwealth [Citations omitted], and notwithstanding the former residence here of the settlor."

The case of *Henderson* v. *Usher* (1935), 118 Fla. 688, 160 So. 9, upon which this Court relies is inapposite. This Court after citing the *Lines* and *Martin* cases distinguished them by stating:

> " * * * While *here the trustees come into court* seeking advice as to how they should proceed in the administration of the trust incident to its repudiation and election by the primary beneficiary to take a child's part. When they did this our view is that they constructively brought the res into the court." (Italics added.)

[fol. 261] This quotation conclusively demonstrates that the trustees in the *Henderson* case voluntarily submitted themselves to the jurisdiction of the Court by appearing. In our case the trustees did not appear and this court, therefore, cannot, under any theory, hold that the assets were constructively before it.

(f) The purported constructive service of process on all of the non-appearing and non-answering defendants whether under the provisions of Chapter 48, Florida Statutes, Section 48.01 and 48.02 or otherwise upheld by this Court contravenes the Constitution and Laws of the State of Florida and the Constitution of the United States,

in particular, Section 1 of the Fourteenth Amendment to the United States Constitution.

2. This Court in an effort to justify the jurisdiction of the Circuit Court, recognized the validity of the original trust (saying at page 5 of its opinion that it does not question the validity of the life estate in Mrs. Donner) and asserted that the situs of this valid trust was moved to this state, as the then domicile of Mrs. Donner, through her execution of the 1949 and 1950 appointments. This Court then concluded that the trust and the appointments, which formed the basis of the Circuit Court's jurisdiction, were invalid.

3. The Court erred in holding that Florida law, rather than Delaware law, was applicable in testing the validity of the trust for the following reasons:

(a) The law governing the validity of a trust is the law of the State of the situs of the trust and, in the case at bar, the situs of the trust is the State of Delaware. The [fol. 262] original trust agreement was executed in the State of Delaware; the trustor named a Delaware trustee; the trustor delivered the corpus of the trust to the trustee in the State of Delaware; and the trust has always been administered in the State of Delaware.

(b) This Court cannot support the validity of the trust for the purposes of applying Florida Law and then apply the same law to destroy the trust.

(c) In reaching the conclusion that Florida law applied, this Court erred in holding that republication is synonymous with "execution". "Republication" merely means "reaffirmation". The executions of said powers (as admitted by appellees and supported by the weight of authority) merely filled in the blanks of the original instrument. Furthermore, by the terms of the trust instrument, these powers only took effect when "delivered to the Trustee". Delivery was made to the Trustee in the State of Delaware and the situs of the trust could not thereby be moved from Delaware to Florida.

(d) The case of *Henderson* v. *Usher*, supra, is not applicable. There the trustees appeared, and the Court held

that, by so doing, they brought the assets constructively before the court.

(e) *Swetland* v. *Swetland*, 105 N.J. Eq. 608, 149 Atl. 50, upon which this Court relied in the *Henderson* decision and cited with apparent approval in this case has been repudiated by the New Jersey Court of Errors and Appeals in *Cutts* v. *Najdorwski* (1938), 123 N. J. Eq. 481, 198 Atl. 885, which stated:

> [fol. 263] "The creation of an inter vivos trust in moneys or securities is governed by the laws of the situs of the money or securities."

Restatement, Conflict of Laws, §299 states as follows:

> "The administration of a trust of movables is supervised by the courts of that state only in which the administration of the trust is located."

This section makes it clear that the only Court which can supervise the administration and distribution of the trust assets is the State in which the administration is located. The only State in which the administration of the trust has been carried on is the State of Delaware.

(f) The failure of this Court to apply Delaware Law constitutes a denial of due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. *Home Life Insurance Company* v. *Dick*, (1930) 281 U. S. 297, 407, 408, 410; *Loucks* v. *Standard Oil Company*, 224 N. Y. 99, 120 N.E. 198, 202 (1918).

4. This Court erred in refusing to give full faith and credit to the decision of the Court of Chancery of the State of Delaware denominated *Hanson* v. *Wilmington Trust Co.*, (1956) 119 A. 2d 901, which held that the original trust agreement and the powers of appointment thereunder were valid and dispositive of the trust assets. This violates Article 4, Section 1, of the Constitution of the United States. The Delaware Court had jurisdiction over the trust assets and is the only Court which had jurisdiction to bind all persons having an interest in the trust property.

[fol. 264] 5. The decision of this Court is unenforceable in face of the mandate of the Delaware Court which is binding on all of the parties to this suit and upon those parties who are in possession of the funds which form the subject matter of this litigation.

In *Riley* v. *New York Trust Company*, 315 U. S. 343 (1942), the United States Supreme Court held that the Courts of the State of Delaware were not bound by a judgment of a Georgia Court in determining the domicile of the testatrix even though her husband, who was the principal claimant against the estate, had been a party to the Georgia proceeding. New York Trust Company, the administrator appointed in the State of New York, was not a party to the Georgia proceeding. The Court said:

> "While the Georgia judgment is to have the same faith and credit in Delaware as it does in Georgia, that requirement does not give the Georgia judgment extraterritorial effect upon assets in other states. So far as the assets in Georgia are concerned the Georgia judgment of probate is *in rem;* so far as it affects personalty beyond the state, it is *in personam* and can bind only parties thereto or their privies. This is the result of the ruling in *Baker* v. *Baker, Eccles & Co.* 242 U. S. 394, 400. Phrased somewhat differently, if the effect of a probate decree in Georgia *in personam* was to bar a stranger to the decree from later asserting his rights, such a holding would deny procedural due process."

And in *Armstrong* v. *Armstrong* (April 9, 1956), 24 L. W. 4173, the Supreme Court of the United States considered a Florida decree rendered against a nonresident wife who was the defendant in a divorce action. The Florida Court, with only constructive service on the wife, purported to decree that she was not entitled to alimony and even di- [fol. 265] rected that she return certain stock certificates located in Ohio. In a separate concurring opinion by Mr. Justice Black, with whom the Chief Justice and Justices Douglas and Clark joined, it was stated:

> "We believe that Ohio was not compelled to give full faith and credit to the Florida decree denying alimony

to Mrs. Armstrong. Our view is based on the absence of power in the Florida Court to render a personal judgment against Mrs. Armstrong depriving her of all right to alimony although she was a nonresident of Florida, had not been personally served with process in that State, and had not appeared as a party."

These decisions, applied to the case at bar, demonstrate that the Courts of this State have no power or jurisdiction to determine the validity of a Delaware trust or the exercise of powers of appointment thereunder when neither the trust res, the trustee nor the beneficiaries are subject to the jurisdiction of the Courts of this State and that the Courts of Delaware may determine the jurisdictional issue for themselves.

6. This Court erred in holding that the reservation of control by the trustor made the trust "illusory" and a mere agency agreement for the following reasons:

(a) Interests in the trust assets vested in named beneficiaries during the lifetime of the trustor.

(b) The Trustor did not have the power to, or attempt to, control the trustee and/or the advisor of the trust in the administration of the trust.

Wherefore, appellants pray that this Court may grant reargument and reconsideration of this suit.

/s/ Manley P. Caldwell, Caldwell, Pacetti, Robinson & Foster, Attorneys for Elizabeth Donner Hanson, Individually and as Executrix, and William D. Roosevelt.

/s/ Edward McCarthy, Attorney for Elizabeth Donner Hanson, Guardian ad Litem.

/s/ W. H. Foulk, Of Counsel.

[fol. 266] Certificate of Service (omitted in printing).

[fol. 268] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

MOTION TO STRIKE PETITION FOR REHEARING AND TO ORDER A MANDATE SENT TO THE LOWER COURT WITHOUT DELAY—
Filed October 17, 1956

Now come the appellees in the above stated case and move to strike the petition for rehearing on the following grounds:

1.

In violation of Rule 45(2) of the Supreme Court, the petition for rehearing is in the form of another brief re-arguing the decisions, principles, and theories which have been argued by the appellants before the Supreme Court in two petitions for certiorari, and on the appeal in this case. No new principle of law is advocated, and no showing is made that the Supreme Court has overlooked any principle of law or fact which would change the outcome of this case.

2.

The allegations and argument on pages 4 and 5 of the petition for rehearing with reference to the case of Henderson v. Usher is specious and inapplicable to the case now before the court.

3.

There was never any trust created by Mrs. Donner except for her own life, and the Wilmington Trust Company and the Delaware Trust Company were never properly named as trustees for anyone except her. The alleged trust instrument and the powers of appointment all specifically provided that nothing was to vest in anyone until six months after her death. The trust instrument and the powers of [fol. 269] appointment thereunder are void, because they are testamentary and were not properly witnessed. The contention of the petitioners that the administration of a trust of movables is supervised by the courts of the state in which the administration of the trust is located, is not

applicable to the assets involved in this case, because no valid trust remainder was created.

4.

The contention on the last page of said petition for rehearing that the "interests in the trust assets vested in named beneficiaries during life of the trustor" is not applicable to this case, because no trust assets vested in any beneficiaries other than the life tenant, as the trust instrument and all powers of appointment thereunder were void because testamentary in form. The trust did not apply to anyone except Mrs. Donner, the trustor who retained only a beneficial life estate. She could revoke the trust at will; she could withdraw funds from the principal at will; she could and did change beneficiaries at will; the distribution of the trust assets was not to be made except after her death; the trustee could make no changes in an investment except on the direction or consent of the advisers specified in the trust instrument. The allegation at the bottom of page 9 of the petition for rehearing that "the trustor did not have the power to, or attempt to, control the trustee and/or the adviser of the trust in the administration of the trust" is not in accordance with the facts shown in the petition to remand, filed by the appellants in this case on the date of the argument on this appeal.

5.

The contention in said petition for rehearing that the Wilmington Trust Company and the Delaware Trust Company are necessary parties is without merit for the reasons set forth in the opinion of the Supreme Court in this case, and for the further reason that where a beneficiary of a trust is bound by a determination of a court, the trustee is likewise bound. These two trust companies are bound under the constructive service statutes as shown in appellees' original brief. Furthermore, the Wilmington Trust Company is not a necessary party, as it has no obligation except to pay the funds allegedly held in trust by it to the Delaware Trust Company for the benefit of either the appellants or [fol. 270] the appellees, whoever prevail in this case. The

Delaware Trust Company is merely the trustee to hold these assets for the benefit of whichever group prevails in this litigation. It is merely a stakeholder, and the real parties in interest are the beneficiaries, and as they are bound by the Florida decision, their trustee is also bound. See "Res Judicata", 65 Harvard Law Review, 818, 857; Union Trust Co. v. Stamford Trust Co. (Conn.) 43 Atl. 555.

Both the appellants and the appellees are parties in this case and they are bound by the decision of this court, and said trust companies, who are the real but hidden litigants in this case, are likewise bound.

6

Movants allege that said petition for rehearing should be stricken because it is patently an effort to delay this case while appellants seek to obtain a decision in Delaware in their favor so as to try to create a conflict in law, and thus further delay this matter by an appeal to the Supreme Court of the United States. The foundation for an appeal to the Supreme Court of the United States is again laid in this petition for rehearing, although it has been laid before in various petitions and pleadings which they have filed, and movants allege that such jurisdictional question is totally without merit.

Wherefore, movants pray that said petition for rehearing be stricken or dismissed promptly in order that there may be no further delay in this case, and in order that the mandate may be sent down without delay.

Redfearn & Ferrell, By /s/ C. Robert Burns, Attorneys for Movants, Appellees herein.

Certificate of Service (omitted in printing)

[fol. 272] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—
November 28, 1956

The petition for rehearing filed by the appellants in the above cause has been considered and said petition is denied.

[fol. 274] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

PETITION FOR STAY OF MANDATE—Filed November 28, 1956

Come Now the Appellants, Elizabeth Donner Hanson, individually, as Executrix of the Will of Dora Browning Donner, Deceased, and as Guardian ad litem for Joseph Donner Winsor and Donner Hanson, and William Donner Roosevelt, individually, pursuant to Section 2101 (f) Title 28, U.S. Code, and petition this Honorable Court to stay the issuance of the mandate herein for a period of Ninety (90) days from the entry of the decree or order of this Court denying Appellants' petition for rehearing herein filed October 13, 1956, or for such other period of time as the Court shall deem to be a reasonable time, to enable Appellants to obtain a Writ of Certiorari from the United States Supreme Court, to review the final decree of this Honorable Court affirming or partly affirming the summary final decree of the Circuit Court for Palm Beach County, Florida, herein dated January 14, 1955; and Appellants [fol. 275] would respectfully show the Court that Appellants do intend in good faith to appeal to or petition said United States Supreme Court for such review.

And your petitioners will ever pray.

Caldwell, Pacetti, Robinson & Foster, By /s/ Manley P. Caldwell, Harvey Building, West Palm Beach, Florida, Attorneys for Appellants.

McCarthy, Lane & Adams, /s/ Edw. McCarthy,
Atlantic National Bank Building, Jacksonville,
Florida, Attorneys for Elizabeth Donner Hanson
as Guardian ad litem for Joseph Donner Winsor
and Donner Hanson.

/s/ William H. Foulk, Delaware Trust Bldg., Wilmington, Delaware, of Counsel.

Duly sworn to by Edw. McCarthy, jurat omitted in printing.

[fol. 277] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

ORDER GRANTING STAY OF MANDATE—November 28, 1956

On application of the appellants it is ordered that execution and enforcement of the judgment of this Court rendered herein on September 19th, 1956, petition for rehearing of said cause having this day been denied, be stayed for ninety days from this date to enable the appellants to have a reasonable time in which to apply for and to obtain, if they can, a review of said cause by the Supreme Court of the United States and the mandate of this Court to the trial court be withheld for said ninety-day period and if review is perfected that the mandate be held pending disposition of the cause by the Supreme Court of the United States. This order is subject to cancellation at any time if the appellant fails to prosecute review by the Supreme Court of the United States with reasonable dispatch.

[fol. 279] IN THE SUPREME COURT OF FLORIDA
SPECIAL DIVISION A.

[Title omitted]

MOTION FOR LEAVE TO FILE EXTRAORDINARY PETITION FOR REHEARING—Filed January 25, 1957

Come now the Appellants, some of the answering defendants in the Circuit Court of Palm Beach County, by their undersigned attorneys, and respectfully show unto the Court that, on January 14, 1957 the Supreme Court of Delaware affirmed the decision of the Court of Chancery of the State of Delaware in and for New Castle County, a copy of which Chancery Court decision was attached to and made a part of Appellants' motion to remand filed herein on March 19, 1956; that Appellants consider that it is of the utmost importance that this Court consider the opinion of the Supreme Court of Delaware before the final disposition of the cause in this Court; that in accordance with order entered herein on November 28, 1956, the mandate in this cause has not been transmitted to the Circuit Court of Palm Beach County, Florida, and this Court accordingly still has jurisdiction of this appeal.

Wherefore, Appellants respectfully move the Court to permit them to file an extraordinary petition for rehearing, said proposed petition with copy of said Delaware opinion [fol. 280] attached, being attached hereto, and made a part of this motion.

/s/ Caldwell, Pacetti, Robinson & Foster, /s/ Manley P. Caldwell, Attorneys for Elizabeth Donner Hanson, Individually, as Executrix of the will of Dora Browning Donner, deceased, and as Guardian ad Litem for Joseph Donner Winsor and Donner Hanson, and William Donner Roosevelt, Individually, 501 Harvey Building, West Palm Beach, Florida.

/s/ Edward McCarthy, Attorney for Elizabeth Donner Hanson, as Guardian ad Litem as aforesaid, Atlantic National Bank Building, Jacksonville, Florida.

Of Counsel, /s/ William H. Foulk, 229 Delaware Trust Building, Wilmington, Delaware.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 281] ATTACHMENT TO MOTION FOR LEAVE TO FILE ETC.

IN THE SUPREME COURT OF FLORIDA, SPECIAL DIVISION A.

[Title omitted]

EXTRAORDINARY PETITION FOR REHEARING—Filed January 25, 1957

Come now the Appellants, some of the answering defendants in the Circuit Court of Palm Beach County, by their undersigned attorneys, and having attached hereto, as a part hereof, a certified copy of the opinion and judgment of the Supreme Court of Delaware, in the case of Elizabeth Donner Hanson, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased, v. Wilmington Trust Company, as Trustee, et al, C. A. No. 8, 1956, petition the Court for a rehearing and reconsideration of the decision rendered on September 19, 1956, and of the order denying Appellants' petition for a rehearing and reconsideration of said decision entered herein on November 28, 1956, upon the grounds set forth in Appellants' petition for rehearing and upon the further grounds that:

1. The decision and judgment of the Supreme Court of Delaware is entitled to full faith and credit in this action under the provisions of Article IV, Section 1 of the Constitution of the United States.

2. The decision and judgment of the Supreme Court of the State of Delaware is res adjudicata of the subject matter of this suit and is binding on all of the parties hereto.

[fol. 282] 3. The decision and judgment of this Court is enforceable in face of the decision and judgment of the Supreme Court of the State of Delaware.

Wherefore, Appellants pray that this Court vacate its order of November 28, 1956, denying Appellants' petition for rehearing and grant reargument and reconsideration of this suit.

/s/ Caldwell, Pacetti, Robinson & Foster, /s/ Manley P. Caldwell, Attorneys for Elizabeth Donner Hanson, Individually, as Executrix of the will of Dora Browning Donner, deceased, and as Guardian ad Litem for Joseph Donner Winsor and Donner Hanson, and William Donner Roosevelt, Individually, 501 Harvey Building, West Palm Beach, Florida.

/s/ Edward McCarthy, Attorney for Elizabeth Donner Hanson, as Guardian ad Litem as aforesaid, Atlantic National Bank Building, Jacksonville, Florida.

Of Counsel, /s/ William H. Foulk, 229 Delaware Trust Building, Wilmington, Delaware.

[fol. 283] ATTACHMENT TO EXTRAORDINARY PETITION FOR REHEARING

No. 8, 1956

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE and PAULA BROWNING DENCKLA, Defendants Below, Appellants,

v.

ELIZABETH DONNER HANSON, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased, Plaintiff Below, Appellee,

WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee under three separate Agreements, (1) and (2) with William H. Donner dated March 18, 1932 and March 19, 1932, and (3) with Dora Browning Donner dated March 25, 1935, Defendant Below, Appellee,

DELAWARE TRUST COMPANY, a Delaware corporation, as Trustee under three separate Agreements (1) with William H. Donner dated August 6, 1940, and (2) and (3) with Elizabeth Donner Hanson, both dated November 26, 1948, Defendant Below, Appellee,

KATHERINE N. R. DENCKLA, Defendant Below, Appellee,

ROBERT B. WALLS, ESQUIRE, Guardian ad litem for Dorothy B. R. Stewart and William Donner Denckla, Defendant Below, Appellee,

ELWYN L. MIDDLETON, Guardian of the Property of Dorothy B. R. Stewart, a mentally ill person, Defendant Below, Appellee,

EDWIN D. STEEL, JR., ESQUIRE, Guardian ad litem for Joseph Donner Winsor, Curtin Winsor, Jr., and Donner Hanson, Defendant Below, Appellee,

BRYN MAWR HOSPITAL, a Pennsylvania corporation, MIRIAM V. MOYER, JAMES SMITH, WALTER HAMILTON, DOROTHY A. DOYLE, RUTH BRENNER and MARY GLACKENS, Defendants Below, Appellees,

LOUISVILLE TRUST COMPANY, a Kentucky corporation, as Trustee for Benedict H. Hanson, and as Trustee under agreements with William H. Donner, Defendant Below, Appellee,

WILLIAM DONNER ROOSEVELT, JOHN STEWART and BENEDICT H. HANSON, Defendants Below, Appellees.

[fol. 284] WOLCOTT and BRAMHALL, Justices, and CAREY, Judge, sitting.

Appeal from a judgment of the Court of Chancery of New Castle County.

Arthur G. Logan and Aubrey B. Lank, of Wilmington, for appellants.

Robert B. Walls, Jr., Guardian *ad litem* for Dorothy B. R. Stewart and William Donner Denckla, appellee *pro se*.

Caleb S. Layton, of Wilmington, for Wilmington Trust Company, appellee.

David F. Anderson, of Wilmington, for Delaware Trust Company, appellee.

Edwin D. Steel, Jr., Guardian *ad litem* for Joseph Donner Winsor, Curtin Winsor, Jr., and Donner Hanson, appellee *pro se*.

OPINION—January 14, 1957

WOLCOTT, *J.*:

This appeal involves two fundamental questions: (1) Whether a purported *inter vivos* trust and the exercise of a power of appointment under it are valid or invalid; and (2) Whether the parties may litigate the question of validity in a Delaware court because of an adverse adjudication upon the point by a Florida court.

The action below, commenced by Elizabeth Donner Han- [fol. 285] son[1] as the Florida executrix of the settlor's will and, also, in her capacity as trustee under the residuary clause of that will, seeks a declaratory judgment establishing the persons entitled to $417,000 which was distributed

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[1] Since its institution, she has been enjoined by the Florida court from prosecuting the action. Since that time, neither she nor her counsel has taken any part in the litigation.

by the *inter vivos* trustee pursuant to the exercise of the power of appointment.

The parties named as defendants in the action include Wilmington Trust Company, trustee under the trust agreement in question and, as such, the distributor of the $417,000, Delaware Trust Company, trustee, the recipient of $400,000 of the trust assets, the recipients of the balance of $17,000, and all possible claimants of the trust corpus, either under the exercise of the power of appointment or under the settlor's Florida will.

The cause came up for decision below on four cross-motions for summary judgment. It will suffice to state that the defendants divide themselves into two contending groups. One group, which we will call the "Lewis Group", maintains that the trust agreement is invalid as an *inter vivos* trust instrument and that, accordingly, the exercise of the power of appointment was testamentary in character and, as such, ineffective under Florida law to pass any interest. The Lewis Group contends that the entire trust [fol. 286] corpus comprises part of the Florida estate of the settlor and passes under her will.

The second group, which we will call the "Hanson Group" maintains that the trust agreement is valid and that, accordingly, the transfer of $417,000 pursuant to the exercise of the appointment is legally sufficient to pass title. Needless to say, the adoption of the contention of one group will benefit it financially to the loss of the other.

The Acting Vice Chancellor granted summary judgment in favor of the Hanson Group, holding that the trust agreement was a valid *inter vivos* trust; that the exercise of the power of appointment was effective to pass title to the $417,000, and that there was no estoppel resulting from the Florida judgment. From this decision the Lewis Group appeals.

The facts are not in dispute. On March 25, 1935, Dora Browning Donner (hereafter Mrs. Donner), then being a resident of Pennsylvania, entered into a trust agreement with Wilmington Trust Company and deposited certain securities with it as the trust corpus. By the terms of the agreement Wilmington Trust Company was directed to manage, invest and reinvest the trust corpus and to pay

over the net income to Mrs. Donner for her life who reserved to herself a power of appointment of the corpus exercisable either by instrument or by will. Failing the exercise of the power, the agreement directed that the trust corpus be distributed by the trustee at her death to her issue surviving, or to her next of kin.

[fol. 287] Specific powers were conferred upon Wilmington Trust Company, as trustee, which in substance were the ordinary powers granted to a trustee. However, it was specified that Wilmington Trust Company could exercise certain of the powers "only upon the written direction of, or with the written consent" of a trust advisor. These powers were (1) to sell trust assets, (2) to invest proceeds of sale of trust property, and (3) to participate in mergers and reorganizations of corporations whose securities were held as part of the trust assets.

In the agreement, Mrs. Donner designated a trust advisor and reserved the right to nominate other advisors at any time during her lifetime. She also reserved the right to amend, alter or revoke the agreement in whole or in part at any time, as well as the right to change from time to time the trustee. On one occasion, she withdrew $75,000 from the trust corpus, which sum she later replaced.

On two different occasions prior to 1949, Mrs. Donner executed instruments exercising the power of appointment. Finally, on December 3, 1949,[2] by a non-testamentary instrument, she exercised the power of appointment, specifically revoking the earlier exercises by her of the power, and directing the Wilmington Trust Company, six months after her death, to pay over a total of $17,000 to Bryn Mawr [fol. 288] Hospital and certain family retainers, $200,000 to Delaware Trust Company in trust for Joseph Donner Winser, $200,000 to Delaware Trust Company in trust for Donner Hanson, and the residue of the corpus to the executrix of her will.

In 1944, Mrs. Donner changed her residence from Pennsylvania to Palm Beach County, Florida where she was domiciled at her death in 1952. Her will was probated in Florida and Elizabeth Donner Hanson duly qualified as

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[2] Later amended in a minor aspect.

executrix. The residuary clause of her will directed her executrix to pay from the residuary estate, which specifically included the balance of the trust corpus not appointed in her lifetime, all death taxes on property appointed from the trust corpus during her lifetime, and to divide the balance remaining into two equal parts, one part to be transferred to Delaware Trust Company in trust for Katherine N. R. Denckla, a daughter; and the other part to be transferred to Elizabeth Donner Hanson in trust for Dorothy B. R. Stewart, another daughter, for her life, and upon her death to Delaware Trust Company in trust for Katherine Denckla.

At the death of Mrs. Donner the trust corpus held by Wilmington Trust Company amounted to in excess of $1,490,000. Thereafter, pursuant to the directions contained in the exercise of the power of appointment Wilmington Trust Company distributed assets in the aggregate amount of $417,000 and transferred a portion of the balance of the corpus to the executrix of the will of Mrs. Donner.

[fol. 289] In January, 1954 the two residuary beneficiaries under the will of Mrs. Donner[3] brought an action for declaratory judgment in Palm Beach County, Florida against Mrs. Hanson, individually and as executrix, Wilmington Trust Company, Delaware Trust Company, and some of the other possible claimants to the assets passing under the residuary clause of the will of Mrs. Donner.[4] In this action a judgment was sought determining what property passed under the will of Mrs. Donner, and the authority of the executrix over the assets held by Wilmington Trust Company under the 1935 agreement.

Neither Wilmington Trust Company nor Delaware Trust Company were served personally in the Florida action, nor did either of them appear. None of the trust assets held by Wilmington Trust Company has ever been held or administered in Florida, nor has Wilmington Trust Company ever done business in the State of Florida.

[3] Katherine Denckla appeared in her own person. Dorothy Stewart appeared by a guardian.

[4] Some of the family retainers, the recipients of a total of $17,000 from the distribution pursuant to the exercise of the power of appointment, were not named as parties.

On January 14, 1955 the Circuit Court of Palm Beach County, Florida entered a decree holding that it lacked [fol. 290] jurisdiction over the trust assets in Delaware and over Wilmington Trust Company, Delaware Trust Company and the other non-answering defendants, and directed that the complaint be dismissed without prejudice as to all of them. It was also held that no present interest passed to any beneficiary other than Mrs. Donner under the agreement of 1935 and that the exercise of the power of appointment by her was testamentary in character and, as such, invalid under Florida law because it was not subscribed by two witnesses. It was held, therefore, that the assets held by Wilmington Trust Company passed under the will of Mrs. Donner, and that the distribution thereof was to be made in accordance with the residuary clause.

Thereafter, an appeal was taken to the Supreme Court of Florida by the equivalent of the Hanson Group seeking a reversal of the holding of invalidity of the 1935 trust and the exercise of the power of appointment. Similarly, the equivalent of the Lewis Group by cross-appeal sought a reversal of the holding of lack of jurisdiction over Wilmington Trust Company and Delaware Trust Company.

The Supreme Court of Florida handed down its opinion (not yet reported) affirming that portion of the decree adjudging the invalidity of the trust and the exercise of the power of appointment, and reversing that portion of the decree holding that Florida had no jurisdiction over Wilmington Trust Company and Delaware Trust Company.

[fol. 291] In the interim, while the appeal was pending in Florida, the Lewis Group perfected its appeal in this court from the judgment of the Acting Vice Chancellor and argued it before us.

In the argument and on the briefs, the main emphasis was placed by the Lewis Group upon the estopping effect of the Florida judgment. In deciding this appeal, however, we think a more logical approach to what has now become a headlong jurisdictional collision between states is to consider first the question of what law governs the basic

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[5] The Florida decree was entered after the instituting of suit in Delaware by the executrix.

validity of the trust agreement and the exercise of the power of appointment, and whether or not under the applicable law the instruments are legally effective as such. We therefore take up first the question of essential validity of the trust and the exercise of the power of appointment.

There is no dispute concerning the pertinent facts. Wilmington Trust Company at all times has done business in Delaware. The trust agreement was executed in Delaware. The assets comprising the trust corpus were delivered to Wilmington Trust Company and retained by it in Delaware. The trust was administered wholly within Delaware. At the time the agreement was executed, Mrs. Donner was a resident of Pennsylvania.

In determining the situs of a trust for the purpose of deciding what law is applicable to determine its validity, the most important facts to be considered are the intention [fol. 292] of the creator of the trust, the domicile of the trustee, and the place in which the trust is administered. *Wilmington Trust Co.* v. *Wilmington Trust Co.*, 26 Del. Ch. 396, 24 A. 2d 309; *Wilmington Trust Co.* v. *Sloane*, 30 Del. Ch. 103, 54 A. 2d 544; *Annotation 89 A.L.R.* 1033.

Generally speaking, a creator of an *inter vivos* trust has some right of choice in the selection of the jurisdiction, the law of which will govern the administration of the trust. *Wilmington Trust Co.* v. *Wilmington Trust Co.*, supra. This trust agreement was signed and the securities delivered to a trustee doing business in Delaware. We think that this circumstance clearly indicates the intent of Mrs. Donner to have the trust administered and governed according to the law of Delaware. 1 *Beale, The Conflict of Laws*, 599.

Formerly, some courts emphasized the domicile of the settlor in deciding what law governed, but the more recent trend of decisions has placed considerably more emphasis on the location of the trust property and its place of administration. *Land, Trust in the Conflict of Laws*, §23; 1A *Bogert, Trusts and Trustees*, §211, p. 327; *Restatement, Conflict of Laws*, §294(2). The manifest intention of Mrs. Donner to create a Delaware trust with a Delaware trustee, the deposit of the trust assets in Delaware, and the administration of the trust in Delaware, make it clear that the situs of the trust created by the agreement of 1935 is

[fol. 293] Delaware, and that, therefore, its law determines its validity.

Not only is it the rule that the essential validity of an inter vivos trust having its situs in Delaware is governed by its law, but it is equally the rule that the validity of the exercise of a power of appointment reserved in such a trust agreement is to be determined in accordance with Delaware law. *Wilmington Trust Co.* v. *Wilmington Trust Co.*, supra; *Equitable Trust Co.* v. *Snader*, 17 Del. Ch. 203, 151 A. 712; *Land, Trusts in the Conflict of Laws*, §24. This is so because the appointments made by the exercise of the power are regarded in law as though they had been embodied in the original trust instrument, and as such as having been created by it. *Wilmington Trust Co.* v. *Wilmington Trust Co.*, supra.

We, therefore, hold that the law of Delaware determines the essential validity of this trust agreement and of the exercise of the power of appointment.

We now reach the question of whether or not this particular trust instrument and the exercise of the power reserved in it are valid under Delaware law.

The Lewis Group first argues that the agreement of 1935 created no present interest in remainder, either vested or contingent, in anyone prior to the death of Mrs. Donner, and that, therefore, it was a testamentary disposition and, as such, invalid for failure to comply with the Florida statutes concerning wills. In support of the argument are cited 3 *Scott on Trusts*, §330.4; 4 *Bogert on Trusts and Trustees*, [fol. 294] §103; and *Restatement, Trusts*, §56. We recognize the rule but we think that it does not apply to the trust created by Mrs. Donner in 1935.

By that agreement Mrs. Donner reserved a life interest to herself, and directed that upon her death the corpus should be distributed as directed by the exercise of a reserved power of appointment. In the event she should die without having exercised the power it was directed that the corpus should be distributed to her then living issue, *per stirpes*, and in default of living issue, to her next of kin.

We think that a present interest in remainder came into existence with the creation of the trust in 1935. That remainder interest was lodged in Mrs. Donner's issue upon

condition they survived her. By the same token, Mrs. Donner's next of kin had an interest in remainder conditioned upon Mrs. Donner dying without leaving surviving issue. It is true that both of these remainder interests—whether vested or contingent makes no difference—were subject to defeasance by the exercise of the reserved power of appointment. That, however, does not mean that they were not present interests created in 1935. *Gray, The Rule Against Perpetuities,* (4th Ed.), §112(3); *Restatement, Property, Future Interests,* §157, comment R. Furthermore, the exercise of the power of appointment by Mrs. Donner by instrument in her lifetime created present interests in the beneficiaries of the appointment, and under the rule of *Wilmington Trust Co. v. Wilmington Trust Co.,* [Fol. 295] supra, those interests are regarded in law as having been embodied in the agreement of 1935. Accordingly, we are of the opinion that the trust is not testamentary in character for failure to create present interests in persons other than the settlor at the time it was created.

The Lewis Group next points to certain provisions of the trust agreement and contends that the effect of them is to destroy it as an effective *inter vivos* deed of trust. These provisions are: (1) The reservation by Mrs. Donner of all of the net income from the trust for her life; (2) The reservation by Mrs. Donner of the right to amend or revoke the trust agreement in whole or in part; (3) The reservation by Mrs. Donner of the right to change the trustee under the trust; (4) The reservation by Mrs. Donner of the right to designate and to change an investment advisor to the trustee; (5) The limitation placed upon the trustee to the effect that certain powers could be exercised only with the consent of or at the direction of the trust advisor, and (6) The reservation by Mrs. Donner of the power to appoint the trust corpus either by *inter vivos* instrument in writing, or by last will and testament.

The Lewis Group contends that cumulatively the above recited provisions have the legal effect of creating an agency relationship between Mrs. Donner and Wilmington Trust Company. It is, therefore, argued that since the relationship was one of agency, the disposition of the trust corpus by Mrs. Donner through the purported exercise of her re-

[fol. 296] served power of appointment was testamentary in character, and, as such, invalid under the law of Florida in which state she had died domiciled.

The Lewis Group cites authorities to the effect that if a settlor retains large powers of control over trust property and a power to change the ultimate beneficiaries of the trust to such an extent that the trust is made as ambulatory as a will, under some circumstances it will not be sustained as a trust, upon the theory that it is a disguised attempt by the settlor to make a revocable disposition of property to take effect after death. The question comes down to whether or not the combined effect of the reserved powers is such as to leave the settlor virtually the owner of the property and the trustee a mere agent. See *Annotation*, 32 ALR (2) 1270.

In Delaware it has long been the law that the reservation of a life interest in trust income coupled with a power to revoke the trust and to dispose of the trust corpus by testamentary appointment will not make the trust testamentary in character. *Equitable Trust* v. *Paschall*, 13 Del. Ch. 87, 115 A. 356. Nor will the reservation of a power to change the trustee at the option of the settlor make it testamentary. *Wilmington Trust Co.* v. *Wilmington Trust Co.*, supra.[*]

[fol. 297] However, the main thrust of the argument of the Lewis Group is directed to the provisions of the agreement providing for the designation of a trust advisor and the limitations on the power of the trustee to act only with the consent of or at the direction of the advisor.

By the agreement, Mrs. Donner reserved the right to change the original advisor named and, in fact, she did so on two separate occasions. The agreement, however,

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[*] This also seems to be the law in most jurisdictions. *United Bldg. & Loan Assn.* v. *Garrett* (1946, D.C.Ark.), 64 F.Supp. 460; *Rose* v. *Rose*, 300 Mich. 73, 1 N.W.2d 458; *Cleveland Tr. Co.* v. *White*, 134 Ohio State 1, 15 N.E.2d 627, 118 ALR 475; *Pickney* v. *City Bank Farmers Trust Co.*, 292 N.Y.S. 835; *Strause* v. *First Nat'l Bank of Ky.* (Ky.), 245 S.W.2d 914, 32 ALR 2d 126; *Leahy* v. *Old Colony Tr. Co.*, 326 Mass. 49, 93 N.E.2d 238, 18 ALR 2d 1006; *City Bank Farmers Tr. Co.* v. *Charity Organization Society*, 265 N.Y.S. 267; *Farkas* v. *Williams*, 5 Ill.2d 417, 125 N.E.2d 600; See 1 *Scott on Trusts*, §57.1.

specifically confines the powers of the trust advisor as limitations on the exercise of the trustee's powers to (1) the power to sell trust property; (2) the power to invest the proceeds of any sale of trust property, and (3) the power to participate in any plan of merger or reorganization of any company in which trust proceeds have been invested. With respect to the exercise of all of the other specific powers granted to the trustee the consent of the trust advisor is not required.

If it be assumed that the exercise by the trustee of the above enumerated powers had been conditioned solely upon the consent of Mrs. Donner herself, it is clear that that [fol. 298] limitation would not have made the trust testamentary in character: *Restatement of Trusts*, §57, Comment g; 1 *Scott on Trusts*, §57.2; 1 *Bogert on Trusts and Trustees*, §104; *National Shawmut Bank of Boston* v. *Joy*, 315 Mass. 457, 53 N.E. 2d 113. It follows logically, therefore, that if Mrs. Donner could have limited the power of the trustee to act only with her consent without making the trust testamentary, the same limitation could have been imposed by requiring the consent of a third party. In point of fact, the *National Shawmut Bank* case was precisely that situation, the power to control the investing of the trust funds having been conferred upon a third person. Furthermore, a trust advisor is a fiduciary, somewhat in the nature of a co-trustee, and is sometimes described as a quasi-trustee. *Gathright* v. *Gaut*, 276 Ky. 562, 124 S.W.2d 782; *Restatement of Trusts*, §185, Comment e; 2 *Scott on Trusts*, §185. The resulting situation fundamentally is not unlike the appointment of co-trustees whose joint action is required in trust matters.

The agreement of 1935 by its terms reserves no power to Mrs. Donner herself over the control or management of the trust property, except such power as may come from her right to revoke the trust, change the trustee and change the advisor to the trustee. As far as the terms of the agreement itself are concerned, the trustee and the advisor were required to use their independent judgment in reaching decisions relating to the administration of the trust. [fol. 299] The terms of the agreement, therefore, do not compel the conclusion that Mrs. Donner retained such a measure of control over the management of the trust pro-

erty that, as a matter of law, the Wilmington Trust Company and the trust advisor named were actually her agents. The entire management of the trust is vested by the terms of the instrument in the trustee and the advisor. We think, therefore, that under the law of Delaware the agreement of 1935 created a valid *inter vivos* trust and not an agency relationship as the Lewis Group contends.

The Lewis Group, however, urges that the history of operation of the trust by Wilmington Trust Company indicates clearly that Wilmington Trust Company was in fact a mere agent. To support this contention, affidavits and depositions were filed upon the theory that the agreement, itself, was ambiguous, and that the history of operation of the trust would be of assistance in resolving the ambiguity.

Such extrinsic evidence is material only in the event of ambiguity in the trust instrument itself. *Restatement of Trusts*, §38. In our opinion, there is no ambiguity in this agreement. On the contrary, we think its provisions are clear with respect to the acts of Wilmington Trust Company which required the consent of the trust advisor. The scheme used in drafting the agreement was to enumerate specific powers granted to Wilmington Trust Company, as trustee. It was then specifically directed that certain, but not all, of [fol. 300] those powers should be exercised by Wilmington Trust Company only with the consent of or at the direction of the advisor of the trust. We think there is nothing ambiguous in this provision and that the requirement of consent of the trust advisor is confined to those specific powers. Consequently, we agree with the Acting Vice Chancellor that the evidence of the history of the trust administration is irrelevant.

In view, however, of the insistence of counsel upon the point, we also will consider it, but we point out that in our opinion such consideration is unnecessary, and probably improper in the absence of an ambiguity in the instrument.

Generally speaking, the evidence discloses that Mrs. Donner named successively three different trust advisors, and that in administering the trust Wilmington Trust Company acted almost entirely in accordance with the directions of the trust advisor. We will assume, as they appear to do, that the affidavits support the contention of the Lewis

Group that Wilmington Trust Company in all details of trust administration accepted unhesitatingly the directions of the advisor, and in fact exercised no independent judgment.

We have no doubt, however, that the voluntary giving up by a trustee of its independent functions as trustee to an advisor named in the trust instrument cannot operate to change the fundamental nature of the relationship created [fol. 301] by the agreement. Such a voluntary failure to act as an independent trustee in those fields in which the agreement contemplated such action may be ground at the insistence of a beneficiary to remove the trustee but, certainly, it cannot change the relationship intended to be created by the trustor.

We note, also, that none of the facts supports at all the contention that Mrs. Donner, herself, had a hand in the management of the trust or made any of the decisions with respect to the internal management of the trust. Indeed, as far as the facts indicate, she knew nothing of the manner in which Wilmington Trust Company and the trust advisor were managing the affairs of the trust.

Assuming, therefore, that the evidence was material, a conclusion we expressly disclaim, nevertheless, there is no showing that Mrs. Donner retained any practical control of the management of the trust estate to the extent that the trustee and the trust advisor were thereby created her agents, with the consequence that, in law, the agreement of 1935 and the exercise of the power of appointment created by it were testamentary in character.

Our conclusion, therefore, is that the agreement of 1935 under the law of Delaware created a valid *inter vivos* trust. Under the law of Delaware, also, we think Wilmington Trust Company was required to transfer the trust assets pursuant to the directions contained in Mrs. Donner's exercise of the power of appointment delivered to it prior to her death.

[fol. 302] The Lewis Group cites principally in support of its argument in this respect *In re Pengelly's Estate*, 374 Pa. 358, 97 A. 2d 844. The case, however, is of little aid to them. It was a suit brought by a widow, estranged from her husband for over forty years, to set aside a purported

inter vivos trust which excluded her from any share in the husband's assets. The purported trust agreement transferred certain securities in trust and granted the trustee the right to invest trust assets "with the approval of the settlor during his lifetime." By the agreement the settlor reserved the income for life, and disposed of the corpus after his death in a manner to exclude his widow.

The court, in its opinion, states the fact to be that the trust agreement was in effect nothing more than the continuance of an arrangement for the management of the settlor's affairs existing between the trustee and the settlor for a period of seven years prior to the execution of the agreement, and that that arrangement was one of principal and agent. Thus, *Pengelly's Estate* dealt with a purported trust which in reality perpetuated a previously existing principal and agent relationship. This relationship was unchanged and continued to be completely subjected to the actual directions of the settlor in its administration. As we have pointed out, in the case before us, however, Mrs. Donner exercised no actual control whatsoever. The two cases are clearly different.

[fol. 303] We have been furnished a certified copy of the opinion of the Supreme Court of Florida in the litigation between some of the parties to this appeal. Later, we will have occasion to refer to this opinion under the point of collateral estoppel, but in connection with the question now under discussion we regard it merely as an additional authority cited by the Lewis Group.

The Florida Supreme Court held that the law of Florida governed the question of validity of the exercise of the power of appointment, because Mrs. Donner was domiciled in Florida at the time of her death. As we have pointed out, however, the domicile of a settlor is at most a minor factor to be considered in determining the situs of an *inter vivos* trust. As we read the opinion it appears to be the theory of the Florida Court that each exercise of the power of appointment was an amendment and republication of the agreement of 1935, and since no present remainder interest was created either by the agreement, or the exercise of the power, until the death of Mrs. Donner domiciled in

Florida, the validity of those remainder interests was to be tested by Florida law.

With all deference to the highest tribunal of a sister state, we disagree. Such may be the law of Florida but it is certainly not the law of Delaware. As we have pointed out, the exercise of a power of appointment creates immediate interests which in law are as though they had been written into the original instrument. The right to revoke or change [fol. 304] the appointment has merely the effect of making the interests thereby created subject to possible defeasance. Furthermore, we think the Florida Supreme Court, in concluding that no present interests in remainder were created by the agreement of 1935, has overlooked, presumably inadvertently, the gift in remainder to Mrs. Donner's living issue, or next of kin, in default of exercise of the power.

We are also constrained to disagree with the conclusion of the Florida Supreme Court that the agreement of 1935 created an agency relationship. The decision in this respect is based, apparently, solely upon the provisions of the agreement, itself, reserving certain powers to Mrs. Donner and requiring in some instances joint action by the trustee and the advisor. As we have pointed out, the reservation of a power to revoke or appoint the corpus of an *inter vivos* trust does not transform the relationship into one of agency. Nor is there anything in the provisions relating to the trust advisor which suggests that the advisor was subject to the dictates of Mrs. Donner. Even the facts concerning the operation of the trust, which we suspect were not before the Florida court, rebut the violent presumption necessary to be made to support the conclusion reached. The opinion of the Florida Supreme Court is not persuasive as an authority.

We think our discussion of the validity of the agreement as an *inter vivos* trust is sufficient answer to other authorities relied upon by the Lewis Group in support of its [fol. 305] contentions under this point.

The second fundamental question is what effect, if any, does the adverse judgment entered in the Florida litigation have upon the right of the Hanson Group to litigate the question of essential validity of the trust of 1935 in Delaware.

The Florida judgment[7] is an adjudication that by reason of the probate of Mrs. Donner's will, Florida, as the state of domiciliary administration, has substantive jurisdiction to inquire into the validity of the 1935 trust and the exercise of the powers of appointment, references to which were made in the will, and to hold them invalid under Florida law. Upon this point, the Supreme Court of Florida affirmed the trial court's ruling of invalidity. In the cross appeal, which sought a review of the trial court's holding that Florida lacked jurisdiction over the non-appearing defendants (among which were Wilmington Trust Company, Delaware Trust Company),[8] the Florida Supreme Court reversed the trial court and held that jurisdiction over the trustee under the trust and the beneficiaries of the exercise of the power of appointment could be obtained by constructive service.

[fol. 306] In their answer the Lewis Group pleads the Florida judgment and upon the basis of it asks for certain relief. The first prayer for relief is that Delaware Trust Company be ordered to account for the $400,000 received by it from the trustee and be directed to transfer it to the executrix of Mrs. Donner's will. The second prayer for relief is, in the event Delaware Trust Company not be ordered to account, that a money judgment be entered against Wilmington Trust Company in the amount of $417,000 with interest.

With respect to the second prayer for relief, it is obvious that, irrespective of the demand that Delaware Trust Company be ordered to account, the Lewis Group seeks a personal judgment against Wilmington Trust Company from the inclusion in the prayer for a judgment of $17,000, since Delaware Trust Company has never received this sum.

The Lewis Group, therefore, seeks to use the Florida judgment as the basis for an assertion of personal liability

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[7] By stipulation of the parties the record has been augmented to include the Florida judgment as finally framed by the Supreme Court of Florida, to all intents and purposes as though it had been pleaded and proven in the court below.

[8] The recipients of $3,000 of the $17,000 appointment were not even named as parties *pro forma* in the Florida action.

against Wilmington Trust Company, and as a judgment *in rem* dispositive of the entire trust corpus. The full faith and credit clause of Article IV of the Federal Constitution is invoked.

The demand of full faith and credit for the Florida judgment as the prop for the assertion of personal liability against Wilmington Trust Company is defeated by the fact that Wilmington Trust Company has never been served personally with Florida process, nor has it appeared in any [fol. 307] form in the Florida litigation. The recital of these facts is sufficient to require the denial of full faith and credit to the Florida judgment when it is sought to be made the basis for the assertion of personal liability. *Iowa-Wisconsin Bridge Co.* v. *Phoenix Corp.*, 2 Terry 527, 25 A. 2d 383, cert. den. 317 U.S. 671. It follows, therefore, that the prayer of the Lewis Group for a money judgment against Wilmington Trust Company was properly denied.

Next, the Lewis Group argues that the Florida judgment is entitled to full faith and credit as a judgment *in rem*. It is, of course, true that the courts of Florida may adjudicate with respect to a *res* within its boundaries and subject to its control, and full faith and credit may be successfully claimed for such a judgment in the courts of other states. *Restatement, Conflict of Laws*, §429. But a judgment which has the force of a judgment *in rem* with respect to assets located in Florida does not acquire by reason of the full faith and credit clause any extra-territorial effect upon assets located outside of the State of Florida in the absence of seizure by the Florida courts. *Riley* v. *New York Trust Co.*, 315 U.S. 343, 62 S.Ct. 609. To have any extra-territorial effect such a judgment must have been rendered after the acquisition of personal jurisdiction over the party claiming the non-Florida assets. *Baker* v. *Baker, Eccles & Co.*, 242 U.S. 394, 37 S.Ct. 152.

The *res*, over which these parties are contending, consists [fol. 308] entirely of corporate securities which at all times since 1935 have been located in Delaware. There has been no seizure of them by any judicial process in Florida, nor has any person or corporation holding the assets voluntarily by appearance brought them before the Florida courts.

The Supreme Court of Florida purports to find jurisdiction over this trust *res* by reason of the Florida domicile of Mrs. Donner and the probate there of her will. In an action brought to construe that will it rendered a decision "as to whether or not the instruments which created their [remainder] interests were effective to shift the trust property out of the estate of the testatrix." This was done on the theory that the last effective act of Mrs. Donner to establish remainder interests in the trust corpus; i.e., the execution of the power of appointment of 1949, was performed by her while a resident of Florida and amounted to a republication of the trust of 1935; it was held that it was as if the original instrument had been executed while she was domiciled in Florida. As we have pointed out, this result is contrary to the law of Delaware, and also the recent trend of well considered decisions in other states.

The Florida court relies upon *Henderson* v. *Usher*, 118 Fla. 688, 160 S. 9, but as we read that case it does not support their holding. In the *Henderson* case an action was filed for the construction of the will of a Florida decedent which purported to exercise a power of appointment over [fol. 309] the corpus of an *inter vivos* trust created by a Florida resident in New York with a New York trustee. The donor deposited the securities comprising the trust corpus in New York, and in the instrument gave a power of appointment by will to the life beneficiary, a Florida resident. The will of the Florida donee of the power created an admittedly testamentary trust by the exercise of his power of appointment over the *inter vivos* trust corpus. Thereafter, the trustees of the testamentary trust, non-residents of Florida, instituted suit for the construction of the Florida will so that they might be instructed as to their duties under the will and the testamentary trust.

The precise question in the *Henderson* case was the validity of constructive service upon the widow of the testator, who had remarried and was a resident of New York. Constructive service upon her was upheld upon the ground that the *res* before the court was the Florida will, and the trust established by it, and since the trustees under the will had voluntarily submitted it to the courts of Florida for adjudication, jurisdiction had thereby been

conferred over the testamentary trust. Furthermore, there was no question but that the Florida will had by the exercise of the power created a Florida testamentary trust. In issue was the right of the widow to receive income from the testamentary trust. There was no issue concerning the rights of anyone arising out of the New York *inter vivos* trust. [fol. 310] The *Henderson* case, therefore, is not authority for the assertion of jurisdiction by Florida over an *inter vivos* trust created and administered in Delaware. The will of Mrs. Donner, contrary to the apparent view of the Florida Supreme Court, did not exercise the reserved power of appointment: That power was exercised in 1949 and a part of the Delaware trust corpus was appointed to her Florida executrix and disposed of by the residuary clause of her will. With respect to this portion of the *inter vivos* trust corpus, it is clear that Florida has jurisdiction since it passes as part of Mrs. Donner's estate; but with respect to the $417,000 appointed to non-Floridians it is equally clear, not only that Mrs. Donner did not intend it to pass as part of her estate, but that Florida has never had the remotest connection with or power over it.

The Florida Supreme Court cites as further authority for its assumption of jurisdiction over the 1935 trust the case of *Swetland* v. *Swetland*, 105 N.J. Eq. 608, 149, A. 50; aff. 107 N.J. Eq. 504, 153 A. 907. This case, however, is not authority for the assumption of jurisdiction under these circumstances. The *Swetland* case was a bill for accounting against a non-resident trustee based on the dissipation and misappropriation of the corpus of an *inter vivos* trust created and administered in New York. The complainants sought an injunction against the New Jersey executors of the creator's New Jersey will, which added a large amount [fol. 311] to the original *inter vivos* trust corpus, from paying it over to the trustee, and sequestered the non-resident trustee's interest in the creator's New Jersey estate. Since the assets themselves were in the hands of New Jersey executors and had by sequestration been subjected to the power of the court, it was held that irrespective of the situs of the trust the court could enforce its decree to the extent of the property sequestered. It is plain that the *Swetland* case is distinguishable.

It follows, therefore, that the Florida judgment is not entitled to full faith and credit as a judgment *in rem* as to the $417,000 which has never been subjected to the control of the Florida court and, as such, a bar to the action before us.

The Lewis Group next argues that irrespective of full faith and credit, the Florida judgment precludes the litigation of the question of essential validity of the 1935 trust as a matter of *res adjudicata* or, in the alternative, as a matter of collateral estoppel.

The doctrine of *res adjudicata* has no application in the pending action because the essence of the doctrine is that the prior judgment raised as a bar must have been rendered in a prior action between the same parties involving the same cause of action asserted in the second action. *Restatement, Judgments,* §48; *Collateral Estoppel by Judgment,* 56 Harv. L.R. 1. It is obvious that we are dealing here with an entirely different cause of action from that tried in [fol. 312] Florida. In Florida the issue was, what assets passed under the will of Mrs. Donner? The Florida ruling, that the exercise of the power of appointment was testamentary, was an implicit ruling of invalidity of the 1935 agreement as an *inter vivos* trust, but it was only incidental to the main issue raised in the Florida proceeding.

This fact is sufficient answer to the assertion of the defense of *res adjudicata,* but it would seem to be clear that it could not be availed of in any event because of the inherent lack of jurisdiction of the Florida courts over some of the parties to this cause and over the subject matter of this suit.

The Lewis Group argues, in the alternative, that the Hanson Group, however, are collaterally estopped by the Florida judgment from relitigating the question of essential validity of the 1935 agreement as an *inter vivos* trust. The doctrine of collateral estoppel is recognized and applied in proper cases by Delaware courts. *Petrucci* v. *Landon,* 9 Terry 491, 107 A. 2d 236; *Niles* v. *Niles* (Del. Ch.), 111 A. 2d 697.

Florida in a direct proceeding would have had no jurisdiction to determine the validity of an *inter vivos* trust whose situs was in Delaware and whose trustee was not

subject to Florida process. 54 *Am. Jur., Trusts*, §564, §584; *Lines* v. *Lines*, 142 Pa. 149, 21 A. 809. It may, however, occur that in an action in Florida over which Florida admittedly has jurisdiction it might become necessary for [fol. 313] the Florida court to decide a question which it would have had no jurisdiction over in a direct proceeding brought for that purpose. In such event, when such question has actually been litigated and fought out by the same parties in the prior action, a collateral estoppel may sometimes be raised against such parties in a second action in which the same issue is raised. We are of the opinion, however, that no collateral estoppel arises in the pending case.

In the first place, a recognized exception to the doctrine exists when the second action is brought in a court having jurisdiction of the subject matter and parties to determine directly the issue decided only incidentally in the first action. *Restatement, Judgments*, §71; *Collateral Estoppel by Judgment*, 56 Harv. L.R. 1, 22; *Annotation*, 147 A.L.R. 225. The action before us was brought in the Court of Chancery to determine directly the validity of the 1935 agreement as an *inter vivos* trust and that court has jurisdiction of the subject matter and the necessary parties. Since the holding of invalidity by the Florida courts was only incidental to the main issue presented to it, the case falls directly within the exception to the doctrine.

In the second place, the doctrine of collateral estoppel is applied only when the same parties in the second action have had their day in court in the first action on the issue in question. This rule is based on the consideration that the proper administration of justice will be served best [fol. 314] by limiting parties to one trial of one issue. See *Niles* v. *Niles*, supra.

The Florida judgment does not meet this condition, for the Delaware trustee and the beneficiaries of the exercise of the power have never had their day in court on this issue.

It does not answer this objection to argue, as the Lewis Group does, that these parties received notice of the pendency of the Florida action and could have appeared in that forum and defended the action. To be sure, they could have done so, but they elected not to, for there was no *res*

before the Florida court the seizure of which would have furnished a compulsive force for their appearance. To hold that in the absence of jurisdiction over the *res* in controversy Florida can compel appearance through substituted service would be a violation of the due process clause of the 14th Amendment. *Pennoyer* v. *Neff*, 95 U.S. 714, 24 S.Ct. 565.

The Lewis Group argues, however, that Wilmington Trust Company and Delaware Trust Company are bound by the Florida judgment to all intents and purposes as though they had appeared in the cause because the various beneficiaries of the trusts were subject to the jurisdiction of the Florida court.[9] The argument is that when a *cestui que trust* is bound by the judgment of a court, the trustee [fol 315] is likewise bound because he is in privity with the *cestui*. It is argued that these particular trustees were mere stakeholders and, as such, were unnecessary parties to the Florida action. *Thompson* v. *Hammond*, (N.Y.) 1 Edw. Ch. 497, and *First National Bank* v. *Ickes*, 60 F. Supp. 366, are cited in support of the argument. We have read these cases and are of the opinion that they do not remotely support the contention.

Furthermore, we think it the law that while a *cestui que trust* is bound in most circumstances by an adjudication against his trustee, *Iowa-Wisconsin Bridge* v. *Phoenix Corp.*, supra, the converse of that proposition is not the law, particularly when the adjudication affects the existence of the trust itself. It is the duty of a trustee to defend the existence of his trust, 2 *Scott on Trusts*, §178, even against an attempt by the settlor and sole beneficiary to overthrow it. Cf. *Weymouth* v. *Delaware Trust Co.*, 29 Del. Ch. 1, 45 A. 2d 427. A trustee is also an indispensable party to a suit involving the trust property, and in defense of title to the trust property. 54 *Am. Jur., Trusts*, §584.

In view of this, it is impossible to accept on principle the argument that a judgment against a *cestui que trust* binds the non-appearing trustee. At the argument, counsel for both groups stated that they had found no authority

[9] No similar argument is made with respect to the recipients of the $17,000 appointment.

so holding, nor have our own researches disclosed any. Upon reflection, we are not surprised that there is none, for any such rule might permit a beneficiary by shopping [fol. 316] around among jurisdictions to defeat the trust against the manifest intent of the trustor. We, therefore, are of the opinion that the non-appearing defendants in Florida are not estopped by the judgment on the ground of privity with appearing defendants.

Finally, we think the public policy of Delaware precludes its courts from giving any effect at all to the Florida judgment of invalidity of the 1935 trust. We are dealing with a Delaware trust. The trust *res* and trustee are located in Delaware. The entire administration of the trust has been in Delaware. The attack on the validity of this trust raises a question of first impression in Delaware and one of great importance in our law of trusts. To give effect to the Florida judgment would be to permit a sister state to subject a Delaware trust and a Delaware trustee to a rule of law diametrically opposed to the Delaware law. It is our duty to apply Delaware law to controversies involving property located in Delaware, and not to relinquish that duty to the courts of a state having at best only a shadowy pretense of jurisdiction. Cf. *Taylor* v. *Crosson*, 11 Del. Ch. 145, 98 A. 375.

We conclude, therefore, that the agreement of 1935 between Mrs. Donner and Wilmington Trust Company created a valid *inter vivos* trust, that the exercise by Mrs. Donner of the power of appointment reserved in that agreement was effective to dispose of the trust corpus, and that the parties to this cause are not estopped by the Florida [fol. 317] judgment from having those questions adjudicated by the Delaware Court of Chancery.

The judgment of the Court of Chancery will be affirmed.

[fol. 318] STATE OF DELAWARE,
KENT COUNTY, *ss.*:

I, T. E. Townsend, Jr., Clerk of the Supreme Court of the State of Delaware, do hereby certify that the foregoing is a true and correct copy of opinion dated January 14, 1957 in cause No. 8, 1956.

as the same remains on file and of record in said Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Dover this 16th day of January, A. D. 1957.

/s/ T. E. Townsend, Jr.
Clerk of the Supreme Court.

(SEAL)

[fol. 320] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

MOTION TO STRIKE EXTRAORDINARY PETITION FOR REHEARING—Filed January 30, 1957

Come now the Appellees and move to strike the Extraordinary Petition for Rehearing filed by the Appellants in this case on the following grounds:

1.

The rules of this Court do not permit the filing of an Extraordinary Petition for Rehearing. The stay of the mandate by the Supreme Court of Florida was for the purpose of permitting Appellants to file a petition in the Supreme Court of the United States for writ of certiorari and not for the purpose of allowing them to file an additional petition for rehearing.

2.

Appellees move to strike Paragraph 1 of the Extraordinary Petition for Rehearing on the ground that the

decision of the Supreme Court of Delaware is not entitled to full faith and credit, because the Florida case originated first and the decision of the Supreme Court of Florida was final before the decision of the Supreme Court of Delaware.

3.

Appellees move to strike Paragraph 2 of the Extraordinary Petition for Rehearing on the ground that it is a mere conclusion of the pleader.

[fol. 321] 4.

Appellees move to strike Paragraph 3 of the Extraordinary Petition for Rehearing on the ground that it is a conclusion of the pleader and on the further ground that the decision of the Supreme Court of Florida is in full force and effect and in all respects enforceable.

Wherefore Appellees pray that said Extraordinary Petition for Rehearing be stricken.

Redfearn & Ferrell, 550 Brickell Avenue, Miami, Florida and
C. Robert Burns, 1318 Harvey Building, West Palm Beach, Florida, Attorneys for Appellees.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 323] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

ORDER GRANTING MOTION OF APPELLEES TO STRIKE APPELLANTS EXTRAORDINARY PETITION FOR REHEARING—February 18, 1957

The attorneys for appellants have filed a motion for an order allowing them to file an extraordinary petition for rehearing in the above cause and the attorneys for appellees have filed a motion to strike motion for leave to file extra-

ordinary petition for rehearing, and the same having been duly considered, it is ordered that the motion of attorney for appellees to strike be and the same is hereby granted.

[fol. 325] IN THE SUPREME COURT OF THE STATE OF FLORIDA

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed February 21, 1957

I. Notice is hereby given that Elizabeth Donner Hanson, Individually, as Executrix of the will of Dora Browning Donner, Deceased, and as Guardian ad Litem for Joseph Donner Winsor and Donner Hanson, and William Donner Roosevelt, Individually, the Appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Florida, affirming in part and reversing in part a Summary Final Decree of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, entered in this action on November 28, 1956.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257-(2).

[fol. 326] II. The Clerk will please prepare a transcript of the entire record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(a) The transcript of the record of proceedings in the Circuit Court of Palm Beach County.

(b) Petition to the Supreme Court of Florida filed in this action on May 14, 1954, for a Writ of certiorari to review an order of the Circuit Court of Palm Beach County dated April 9, 1954, postponing ruling on motion of Appellants to dismiss action for want of jurisdiction.

(c) Petition for rehearing of order denying aforesaid petition, filed in the Supreme Court of Florida on July 13, 1954.

(d) Petition to the Supreme Court of Florida filed in this action on September 28, 1954, for a Writ of Certiorari to review an order of the Circuit Court of Palm Beach County dated August 25, 1954, denying Appellants motion to stay the proceedings in said Court pending determination of the questions involved in this action by the Court of Chancery of the State of Delaware.

(e) Motion to remand filed by Appellants in this action on March 19, 1956, including copy of Opinion [fol. 327] of the Court of Chancery of the State of Delaware dated December 28, 1955, and copy of order of said Court dated January 13, 1956.

(f) Response of Appellees to said motion to remand and motion to dismiss said motion filed in this action on March 27, 1956.

(g) Opinion of this Court filed September 14, 1956.

(h) Petition of Appellants to extend time for filing petition for rehearing filed in the Supreme Court of Florida on September 28, 1956.

(i) Order of the Supreme Court of Florida dated September 28, 1956, extending time for filing petition for rehearing.

(j) Petition of Appellants for rehearing filed in this action on October 13, 1956.

(k) Motion of Appellees to strike petition for rehearing and to order a mandate without delay.

(l) Order of the Supreme Court of Florida denying petition for rehearing dated November 28, 1956.

(m) Petition of Appellants for a stay of the mandate filed in this action on November 28, 1956.

(n) Order of the Supreme Court of Florida granting stay of mandate dated November 28, 1956.

[fol. 328] (o) Motion of Appellants for leave to file extraordinary petition for rehearing filed in this action on January 25, 1957.

(p) Motion of Appellees to strike motion for leave to file extraordinary petition for rehearing filed in this action on January 30, 1957.

(q) Order of the Supreme Court of Florida granting motion of Appellees to strike Appellants' motion for leave to file extraordinary petition for review filed herein on February 18, 1957.

(r). This Notice of Appeal.

III. The following questions are presented by this appeal:

(a) Do the provisions of Chapter 48, Florida Statutes, Sections 48.01 and 48.02, violate the Constitution of the United States (in particular, Section 1 of the Fourteenth Amendment thereto) where said Statute is used by the Supreme Court of Florida as a basis for jurisdiction to decree the devolution of property outside its jurisdiction and in the hands of trustees who were not personally served with process, who have not appeared in the proceedings and who have no places of business, have never conducted business and have no officers, agents or representatives in the State of Florida?

[fol. 329] (b) Do the provisions of Chapter 48, Florida Statutes, Sections 48.01 and 48.02, violate the Constitution of the United States (in particular, Section 1 of the Fourteenth Amendment thereto) where said Statute (in particular, 48.01 (5)) was used by the Supreme Court of Florida, under the guise of construing a *clear* and *unambiguous* will, for the sole purpose of declaring invalid an inter vivos trust whose situs, property and trustees were all outside the jurisdiction of the Court and whose trustees were not personally served with process and did not appear in the proceedings?

(c) Does the refusal of the Supreme Court of Florida to give full faith and credit to the judgment of the Court of Chancery of the State of Delaware and the Supreme Court of the State of Delaware, both courts of competent jurisdiction, having control over the trust

res, the trustees and all of the beneficiaries of the trust contravene the Constitution of the United States (in particular, Section 1 of Article IV thereof)?

(d) Did the Supreme Court of Florida err in refusing to apply the law of Delaware in determining the validity of a trust having its situs in Delaware?

(e) Did the Supreme Court of Florida err in holding [fol. 330] that the inter vivos trust agreement was valid insofar as it created a beneficial life estate in the settlor and that it was republished in Florida so as to become subject to jurisdiction of the Florida Courts for the sole purpose of decreeing its invalidity?

(f) Did the Supreme Court of Florida err in reaching a conclusion which is totally lacking in comity and is unenforceable in the face of the mandate of the Court of Chancery of the State of Delaware and the Supreme Court of the State of Delaware?

/s/ Manley P. Caldwell, Attorney for Elizabeth Donner Hanson, Individually, as Executrix of the will of Dora Browning Donner, Deceased, and as Guardian ad Litem for Joseph Donner Winsor and Donner Hanson, and William Donner Roosevelt, Individually, 501 Harvey Building, West Palm Beach, Florida.

/s/ Edward McCarthy, Attorney for Elizabeth Donner Hanson, as Guardian ad Litem as aforesaid, Atlantic National Bank Building, Jacksonville, Florida.

Of Counsel, /s/ Wm. H. Fouik, 229 Delaware Trust Building, Wilmington, Delaware.

[fol. 331] Proof of Service (omitted in printing)

[fol. 332] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 333] SUPREME COURT OF THE UNITED STATES

No. 918—October Term, 1956

Elizabeth Donner Hanson, Individually, as Executrix of the Will of Dora Browning Donner, Deceased, et al.,
Appellants,

v.

Katherine N. R. Denckla, Individually, and Elwyn L. Middleton, as Guardian of the Property of Dorothy Browning Stewart, etc.

Appeal from the Supreme Court of the State of Florida.

ORDER POSTPONING JURISDICTION—June 17, 1957

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. The case is consolidated with No. 977 and a total of two hours allowed for oral argument.

IN SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1957

No. 107

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

ELIZABETH DONNER HANSON, Individually, as Executrix of the Will of DORA BROWNING DONNER, Deceased, et al., Appellants,

v.

KATHERINE N. R. DENCKLA, Individually, and ELWYN L. MIDDLETON, as Guardian of the Property of DOROTHY BROWNING STEWART, etc., Appellees.

STIPULATION—Filed December 13, 1957

It Is Hereby Stipulated And Agreed by and between the attorneys for the respective parties hereto that the attached certified copy of Notice of Suit shall be printed by the Clerk and considered as a part of the printed Transcript of Record herein. This stipulation is based upon the fact that the printed Transcript of Record on file herein fails to show the following, which should have appeared at the end of the Notice of Suit appearing at pages 37 and 38 of such Transcript of Record:

"14 copies of the plaintiff's initial pleadings were mailed this date, with copy of the above notice of suit, to all parties whose addresses are stated in the initial pleadings or affidavit.

Dated January 25, 1954
J. Alex Arnette, Clerk Circuit Court

By /s/ Thaddie P. Plant.
Deputy Clerk"

This stipulation dated this 22nd day of November, 1957.

William H. Foulk, 229 Delaware Trust Building, Wilmington 1, Delaware; Manley P. Caldwell, Caldwell, Paeetti, Robinson & Foster, 501 Harvey Building, West Palm Beach, Florida, Attorneys for Elizabeth Donner Hanson, Individually, as Executrix of the Will of Dora Browning Donner, Deceased, and as Guardian ad Litem for Joseph Donner Winsor and Donner Hanson, and William Donner Roosevelt, Appellants.

Of Counsel: Edward McCarthy, McCarthy, Lane & Adams, 423 Atlantic Bank Building, Jacksonville, Florida, Attorney for Elizabeth Donner Hanson as Guardian ad Litem for Joseph Donner Winsor and Donner Hanson.

D. H. Redfearn, 550 Brickell Avenue, Miami 32, Florida; C. Robert Burns, 1318 Harvey Building, West Palm Beach, Florida, Attorneys for Appellees.

Of Counsel for Appellees: R. H. Ferrell, 550 Brickell Avenue, Miami 32, Florida; Sol A. Rosenblatt, 630 Fifth Avenue, New York 20, N. Y.; Charles Roden, 630 Fifth Avenue, New York 20, N. Y.

NOTICE TO APPEAR AND DEFEND

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA—IN CHANCERY

No. 31,980

(Rubber stamp)

Filed
Jan 22 1954
J. Alex Arnette
Clerk of Circuit Court
By Thaddie P. Plant, D.C.

KATHERINE N. R. DENCKLA, individually, and ELWYN L. MIDDLETON, as guardian of the property of DOROTHY BROWNING STEWART, also known as Dorothy B. Stewart and Dorothy B. Rodgers Stewart, an incompetent person, Plaintiffs,

v.

WILMINGTON TRUST COMPANY, a Delaware corporation, et al., Defendants.

To: Wilmington Trust Company, in its individual corporate capacity and as trustee, Wilmington, Delaware;

Louisville Trust Company, in its individual corporate capacity and as trustee, Louisville, Kentucky;

Delaware Trust Company, in its individual corporate capacity and as trustee, Wilmington, Delaware;

Bryn-Mawr Hospital, in its individual corporate capacity and as trustee, Bryn-Mawr, Pennsylvania;

The Donner Corporation, a Pennsylvania corporation, 1710 Fidelity Trust Building, Philadelphia, Pennsylvania;

Benedict H. Hanson, 510 Park Avenue, Apartment B-4, New York, N. Y.;

John Stewart, Beachwood Road, Rosemont, Pennsylvania;

Dora Browning Stewart Lewis, 7000 Glendale, Chevy Chase, Maryland;

Mary Washington Stewart Borie, 6912 Madisonville Road, Marimont, Cincinnati, Ohio;

Miriam V. Moyer, 1719 Fidelity Trust Building, Philadelphia, Pennsylvania;

James Smith, 221 Williams Road, Rosemont, Pennsylvania;

Dora Donner Ide, 485 Park Avenue, New York, N. Y.;

Paula Browning Denckla, 5 East 67th Street, New York, N. Y.;

William Donner Denckla, 5 East 67th Street, New York, N. Y.;

You and each of you are hereby notified that a bill for declaratory decree has been filed against you in the above styled case and you and each of you are required to file your answer thereto with the clerk of said court and to serve a copy thereof upon Burns, Middleton & Rogers, or Redfearn & Ferrell, attorneys for plaintiffs, whose addresses are shown below, on or before the 25th day of February, 1954, otherwise decree pro confesso will be entered against you.

Dated at West Palm Beach, Florida, January 22nd, 1954.

(SEAL)

J. Alex Arnette, Clerk of said Circuit Court, by Thaddie P. Plant, Deputy Clerk.

C. Robert Burns, Harvey Building, West Palm Beach, Florida and Redfearn & Ferrell, 550 Brickell Avenue, Miami, Florida, Attorneys for Plaintiffs.

(Handwritten)

Publish: Palm Beach Times, Jan. 23, 30; Feb. 6, 13, 1954.

(Rubber stamp)

14 Copies of the plaintiff's initial pleadings were mailed this date, with copy of the above notice of suit, to all parties whose addresses are stated in the initial pleadings or affidavit.

Dated January 25, 1954.

J. Alex Arnette, Clerk Circuit Court, by Thaddie P. Plant, Deputy Clerk.

STATE OF FLORIDA,
COUNTY OF PALM BEACH, *ss.*:

I, J. Alex Arnette, Clerk of the Circuit Court of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County, do hereby certify that the above and foregoing is a true and correct photostatic copy of the following, to-wit:

> Notice To Appear And Defend with Certificate of Clerk as to mailing copies of Plaintiffs' initial Pleadings, with copy of said Notice to Appear and Defend, to All parties whose addresses are stated in the initial pleadings or affidavits, on January 25th, 1954—as filed in this office, January 22nd, 1954, in Chancery No. 31,980 in the case of Katherine N. R. Denckla, individually, and Elwyn L. Middleton, as Guardian of the property of Dorothy Browning Stewart, Etc., Plaintiffs vs. Wilmington Trust Company, a Delaware corporation, et al. Defendants.

In Witness Whereof, I have hereunto set my hand and seal of said Court at West Palm Beach, Florida, this the 25th day of November, A. D. 1957.

J. Alex Arnette, Clerk of Circuit Court, Palm Beach County, Florida, by Mamie L. Harman, Deputy Clerk.

(SEAL)